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v.
City of Los Angeles

Docketed:
November 16, 1988

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Fasman,Zachary D.

Counsel for respondent: Haggerty,John F.

Entry	Date	Note	Proceedings and Orders
1	Nov 16 1988	G	Petition for writ of certiorari filed.
2	Dec 16 1988		Brief of respondent Los Angeles in opposition filed.
3	Dec 21 1988		DISTRIBUTED. January 13, 1989
4	Dec 28 1988	X	Reply brief of petitioner Golden State Transit Corp. filed.
6	Jan 13 1989		REDISTRIBUTED. January 19, 1989
8	Feb 6 1989		REDISTRIBUTED. February 17, 1989
9	Feb 21 1989		Petition GRANTED. limited to the following question: "Whether in the absence of a direct violation of a federal statute, an allegation that a state statute is preempted by a federal statute is cognizable under 42 U.S.C. Section 1983."
			**********
11	Mar 7 1989		Order extending time to file brief of petitioner on the merits until April 22, 1989.
13	Apr 21 1989		Joint appendix filed.
14	Apr 21 1989		Brief of petitioner Golden State Transit Corp. filed.
12	Apr 22 1989		Brief amicus curiae of American Trucking Associations, Inc. filed.
15	May 25 1989		Brief amici curiae of Natl. League of Cities, et al. filed.
16	May 25 1989		Brief of respondent Los Angeles filed.
17	Jun 24 1989		Reply brief of petitioner Golden State Transit Corp. filed.
18	Jul 13 1989		CIRCULATED.
19	Jul 20 1989		SET FOR ARGUMENT TUESDAY, OCTOBER 3, 1989. (1ST CASE)
20	Sep 20 1989		Record filed.
		*	Certified copy of C.A. Proceedings and briefs received.
21	Sep 28 1989		Record filed.
		*	Certified copy of original record, 5 volumes, received.
22	Oct 3 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

88-840 (1)

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

GOLDEN STATE TRANSIT CORP.,
Petitioner,

v.

CITY OF LOS ANGELES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the federal courts have the power, either under 42 U.S.C. § 1983 or pursuant to their inherent authority, to award compensatory damages to an employer whose business was destroyed by a municipality because the employer chose to exercise its federal statutory rights.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below subject to this petition for a writ of certiorari are set forth in the caption of the petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. ———

GOLDEN STATE TRANSIT CORP.,
Petitioner,

v.

CITY OF LOS ANGELES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Golden State Transit Corporation respectfully prays that a writ issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, dated September 15, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, dated September 15, 1988, is presently unreported and is reprinted in the Appendix to this Petition ("Pet. App."), at 18a. Other relevant opinions below are reported, and are cited in this Court's prior ruling in this case, 475 U.S. 608 (1986), reprinted in Pet. App., at 1a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on September 15, 1988. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved, set forth in Pet. App., at 32a, are:

Supremacy Clause, United States Constitution, Article VI, clause 2.

National Labor Relations Act ("NLRA"), Section 8(d), as amended, 29 U.S.C. § 158(d).

The Civil Rights Act of 1871, 42 U.S.C. § 1983.

STATEMENT OF THE CASE[1]

This case arose because the City of Los Angeles ("the City") decided to condition renewal of Golden State Transit Corp.'s ("Golden State") franchise to operate Yellow Cab of Los Angeles, then the City's largest taxicab company, upon immediate resolution of a peaceful labor dispute between Golden State and the Teamsters local representing Golden State's drivers. The Teamsters had struck at midnight on February 11, 1981, the day that the City Council was to consider renewal of the franchises of all thirteen cab companies operating in Los Angeles. Although Golden State had been found fully qualified for long-term renewal of its franchise by all subordinate city agencies, at the Teamsters' behest the

[1] This case concerns the remedial aspects of the controversy considered by the Court in *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986). The salient facts and procedural history of this case are set forth in detail in the Supreme Court's prior opinion, 475 U.S., at 609-13, Pet. App., at 2a-6a. The following summary highlights those issues most relevant to the remedial question raised in this petition, focusing on post-Supreme Court developments in this litigation.

City Council voted to withhold renewal of Golden State's franchise pending settlement of the labor dispute.[2]

Golden State immediately initiated this lawsuit against the City, seeking declaratory and injunctive relief and damages. On April 13, 1981, the U.S. District Court for the Central District of California found that the City's conduct denied Golden State rights granted by the federal labor laws and enjoined the City's interference in the labor dispute. 520 F. Supp. 191 (C.D. Cal. 1981) (*see* 475 U.S., at 611-12, Pet. App., at 4a-5a). This preliminary injunction was overturned on appeal, 686 F.2d 758 (9th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). The Ninth Circuit held that while the City conditioned renewal of Golden State's franchise upon immediate resolution of the labor dispute, 686 F.2d, at 759, the use of streets and highways was a matter of "local concern" and therefore municipal regulation of labor disputes involving streets and highways did not conflict with federal law. *Id.* at 760.

The case was remanded to the district court, which denied Golden State's renewed request for injunctive relief. The next day following that denial, still in the midst of this litigation, the City served a cease and desist order upon Golden State, forcing its cabs off the roads and destroying its business.[3]

[2] The Mayor and various members of the City Council previously had attempted unsuccessfully to mediate the differences between the Teamsters and Golden State. As stated in this Court's opinion, 475 U.S., at 610-11, Pet. App., at 3a-4a, the City Council initially voted to hold Golden State's franchise in abeyance for approximately one month, allowing the parties time to settle the dispute. When no settlement was achieved, on March 23, 1981, again at the behest of the Teamsters, the City Council denied Golden State renewal of its franchise.

[3] At the time of this cease and desist order, Golden State was involved in an involuntary Chapter 11 reorganization initiated by one of its creditors. The Chapter 11 proceeding was converted to a Chapter 7 liquidation thereafter.

The case returned to the Ninth Circuit after a final ruling against Golden State in the district court. In its second ruling, the Ninth Circuit disavowed its prior opinion, holding that reliance upon the "local concern" exemption had been misplaced, and that municipal regulation of labor matters involving "streets and highways" could be inconsistent with federal labor law. 754 F.2d 830, 832-33 (9th Cir. 1985). The Ninth Circuit concluded, however, that "only actions seeking to directly alter the substantive outcome of a labor dispute should be preempted," *id.*, at 833, and that the City's conduct was permissible because it had not attempted to dictate the terms of the parties' collective bargaining agreement. *Id.*

The Court's Previous Ruling

This Court granted certiorari and reversed. The Court found ample evidence in the record to establish that the City in fact conditioned renewal of Golden State's franchise upon resolution of the labor dispute, 475 U.S., at 615-16, n.6, Pet. App., at 9a, n.6, and held that the City Council's attempt to force a settlement of the labor dispute denied Golden State the right to rely upon its economic strength in a labor dispute and to bargain free from government coercion.

> The parties' resort to economic pressure was a legitimate part of their collective-bargaining process. *Machinists* [*v. Wisconsin Employment Relations Comm'n*], 427 U.S. [132], at 144. But the bargaining process was thwarted when the city in effect imposed a positive durational limit on the exercise of economic self-help. . . .

475 U.S., at 615, Pet. App., at 8a-9a.

> " '[r]esort to economic weapons should more peaceful measures not avail' is the right of the employer as well as the employee," and "the State may not prohibit the use of such weapons . . . any more than in the case of employees." *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S., at 147,

> quoting *American Ship Building Co. v. NLRB*, 380 U.S., at 317. "[F]ederal law intended to leave the employer and the union free to use their economic weapons against one another." *Belknap, Inc. v. Hale*, 463 U.S., at 500. We hold, therefore, that the city was pre-empted from conditioning Golden State's franchise renewal on the settlement of the labor dispute.

475 U.S., at 618, Pet. App., 12a. The Court reaffirmed the primacy of free collective bargaining under the federal labor laws, 475 U.S., at 619, Pet. App., at 12a-13a, and held that municipal coercion such as applied here directly conflicted with the system of private industrial dispute settlement created by Congress. Justice Rehnquist dissented, reasoning that the express language of the NLRA did not support this application of the Court's labor law preemption doctrine. 475 U.S., at 623, Pet. App., at 16a-17a.

Post-Remand Proceedings

On remand the district court granted Golden State summary judgment on liability, finding once again that the City had conditioned renewal of Golden State's franchise upon immediate resolution of the labor dispute.[4] During the course of argument on summary judgment, however, the district court *sua sponte* ordered further argument and briefing on the court's power to award compensatory damages to Golden State. Golden State contended that compensatory damages were appropriate both under 42 U.S.C. § 1983 and pursuant to the inherent remedial powers of the federal courts. The City disagreed, but admitted that injunctive relief against it was appropriately entered.

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[4] Golden State had not filed a motion for summary judgment prior to Supreme Court review. In the summary judgment proceedings in the district court, the City did not present any evidence, contenting itself with arguing that every court that had considered this case—including this Court—had misconstrued the record and the City's motives. Summary judgment was entered without written opinion.

The district court held that it had no power to award damages in this case, rejecting the "nebulous notion" that it possessed any inherent power to award damages. The district judge further concluded that Section 1983 relief was inappropriate, both because "the NLRA does not create rights and obligations with respect to third parties who are not parties to a collective agreement" and because the National Labor Relations Board's primary jurisdiction over wrongs committed by employers and unions precluded judicial relief, under Section 1983, against state or local governments. The district court concluded that injunctive relief was appropriate, however, accompanied by ancillary monetary relief limited to the fair market value of Golden State's tangible assets on March 23, 1981 (the date the City Council decided not to renew Golden State's franchise), less any sums received by Golden State during the ensuing bankruptcy. The court, at the joint request of the parties, agreed to certify for immediate appeal the issue of its power to award compensatory damages.[5]

The Decision Below

The Ninth Circuit affirmed, concluding that the federal courts have no power to award damages in this case. The panel below held that Section 1983 was limited to cases involving a "direct violation" of a federal statute, and that the express language of the NLRA "impose[s] obligations on 'an employer' and on 'a labor organization.' Actions of a third-party, not employer or employee labor organization, do not give rise" to a "direct violation" of the NLRA. Pet. App., at 24a. Despite the clear absence of any alternative federal statutory remedy against the City, the panel further held that Congress deliberately precluded judicial enforcement of Golden State's rights under Section 1983 by empowering the National Labor Relations Board ("NLRB") to rectify unfair labor practices committed by employers and unions. Pet. App., at 25a. The panel found no direct or actual conflict between the City's action and the NLRA because "the NLRA does not explicitly prohibit the City from acting in the area of labor relations," Pet. App., at 27a, and thus refused to hold that Section 1983 relief was appropriate under the Supremacy Clause. Finally, the panel held that in this case no "inherent authority exists in the federal courts to award compensatory damages where section 1983 damages are unavailable," Pet. App., at 28a, reasoning that any such inherent authority was limited to cases involving "individual constitutional right[s]." *Id.*

[5] By refusing to allow recovery for Golden State's intangible assets (goodwill and the going concern value of the largest and oldest taxi company in Los Angeles), the proposed monetary remedy would not be of any substantial value to Golden State. Neither would an injunction be of value to an employer long ago forced to liquidate its business. As the City has recognized by not opposing certification or a stay of mandate below, the sole issue of any substance remaining in this case is Golden State's right to compensatory damages.

Judge Alarcon, expressing serious reservations, concurred in the judgment "under compulsion of our decision in *White Mountain Apache Tribe v. Williams* (*White Mountain*), 810 F.2d 844 (9th Cir.), *cert. denied*, [479 U.S. 1060] 107 S. Ct. 940 (1987)." Pet. App., at 29a. Admitting that "the law of the circuit compels us to hold that section 1983 damages are not available because the City of Los Angeles did not directly violate the National Labor Relations Act," Judge Alarcon concluded that "I believe that *White Mountain* is inconsistent with the reasoning of the Supreme Court in *Wright v. Roanoke Redev. and Housing* [479 U.S. 418] 107 S. Ct. 766 (1987)," Pet. App., at 29a:

> The Court in *Wright* did not hold that a state actor would be liable only if a federal statute expressly forbids the state actor from such interference. Instead, the Court focused on protecting the right secured by federal law, and not on whether all persons who might deprive another of the benefits of such a statute are identified by Congress. The language used by the Court in *Wright* carries out

the plain meaning of the language of section 1983. Our opinion in *White Mountain* frustrates congressional intent.

. . . .

In the case *sub judice*, the City of Los Angeles deprived Golden State of the statutory right to engage in the collective bargaining process free from third-party interference. 29 U.S.C. § 158(d); *Golden State*, 475 U.S. at 618. Thus, under *Wright*, Golden State would appear to have cause of action for damages under section 1983.

Pet. App., at 30a.

REASONS FOR GRANTING THE WRIT

I. REFUSAL TO GRANT A DAMAGE REMEDY EFFECTIVELY NEGATES THIS COURT'S DECISION IN *GOLDEN STATE TRANSIT CORP. v. CITY OF LOS ANGELES*.

In *Golden State*, this Court held "that the City was pre-empted from conditioning Golden State's franchise renewal upon settlement of the labor dispute," 475 U.S., at 618, Pet. App., at 12a, because Congress deliberately intended to protect management and labor from governmental interference in the collective bargaining process.[6]

[6] This Court stated:

> There is no question that the Teamsters and Golden State employed permissible economic tactics. . . .
>
> The parties' resort to economic pressure was a legitimate part of their collective-bargaining process. [Citation omitted.] But the bargaining process was thwarted when the city in effect imposed a positive durational limit on the exercise of self-help. . . .
>
> That such a condition—by a city or by the National Labor Relations Board—contravenes congressional intent is demonstrated by the language of the NLRA and its legislative history. . . .
>
> "'resort to economic weapons should more peaceful measures not avail' is the *right* of the employer as well as the employee," and "the State may not prohibit the use of such weapons . . .

This Court reiterated that "[f]ree collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA,"[7] and concluded that the City improperly forced Golden State to choose between its business and its bargaining position.

The ruling below renders this Court's decision meaningless. By denying Golden State the only effective remedy available—compensatory damages—the Ninth Circuit concluded that Golden State's right to bargain free from local government coercion was a right in name only, and rendered this Court's prior decision a mere advisory opinion on the law, of no consequence to the now-defunct "winner."

We submit that this Court, by specifically holding that Congress forbade this very municipal interference with collective bargaining, necessarily intended that the lower courts would use normally available remedies to grant Golden State meaningful relief.[8] It simply is illogical to

> any more than in the case of employees." *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S., at 147, quoting *American Ship Building Co. v. NLRB*, 380 U.S., at 317. "[F]ederal law intended to leave the employer and the union free to use their economic weapons against one another." *Belknap, Inc. v. Hale*, 463 U.S. at 500.
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> 475 U.S., at 615, 616, 618, Pet. App., at 8a, 9a, 12a (emphasis added).

[7] 475 U.S., at 619, Pet. App., at 12a (quoting *New York Tel. Co. v. New York Labor Dep't*, 440 U.S. 519, 551 (1979) (Powell, J., dissenting)). *See also Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753-55 (1985); *Belknap, Inc. v. Hale*, 463 U.S. 491, 524 (1983) (Brennan, J., dissenting); *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 102-04 (1970); *Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 484-86 (1960).

[8] Compensatory damages, of course, are a "remedial mechanism normally available in the federal courts." *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971). "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert

conclude, consistent with this Court's decision, that the federal courts may not award a traditional damage remedy to an employer whose business was singled out and destroyed solely because its owners bargained in precisely the fashion envisioned by Congress. This Court concluded that by conditioning franchise renewal upon resolution of the labor dispute, the City unlawfully destroyed Golden State's business; according to the Ninth Circuit, Golden State, and not the City, must bear the loss occasioned by the municipal conduct already condemned by this Court.

Compensatory damages are a necessary and appropriate remedy for Golden State's injuries. Granting an injunction—even accompanied by the illusory ancillary relief envisioned by the district court—to a business unlawfully destroyed years ago does not even begin to restore the status quo, and ignores the years of lost profits and competitive harm occasioned by the City's illegal conduct.[9] This case does not fall within the limited class of cases in which damages might be considered inappropriate. The City has no claim to eleventh amendment immunity, *Owen v. City of Independence*, 445 U.S. 622, 639 (1980), and all of the difficult issues in this case—including whether a remediable wrong has been committed—have been resolved by this Court's opinion and the City's admission that injunctive relief is ap-

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to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnotes omitted).

[9] As stated above, it was the City's own conduct that created the need for a damage remedy. In 1983, once the preliminary injunction was overturned on appeal and the district court refused to renew the prohibition, the City immediately issued a cease and desist order to Golden State, forcing its cabs off the street and the company into liquidation. The City had no pressing reason for this conduct; there is not even a hint that the City's action served any legitimate public interest.

propriate. We do not seek damages on behalf of an ill-defined or unwieldy class, nor do we ask the courts to establish a value for inchoate constitutional rights. The business issues involved in calculating Golden State's damages—assigning a value to the business, and estimating lost profits during the years that Golden State improperly was prevented from operating—are addressed by the federal courts on a daily basis, in cases ranging from antitrust to takings. Thus, the basic principle, tracing back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), "that every right, when withheld, must have a remedy and every injury its proper redress," is fully applicable here.[10]

The decision below not only denies Golden State its due, but poses a substantial and direct threat to the bargaining process. Confiding exclusive protection of the collective bargaining process, the key concern of the NLRA, to the equitable discretion of the lower courts would be a serious error. The lower federal courts repeatedly have shown a less than complete understanding of this difficult area; in this very case, where the municipal interference with bargaining was of the crudest

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[10] The Ninth Circuit's conclusion that the federal courts somehow have been deprived of their traditional power to award damages in this case has absolutely no historical or logical basis. Damage remedies cannot be limited to the scope of Section 1983, as intimated by the court below. Long prior to the passage of Section 1983, a supplementary remedy designed to implement the provisions of the fourteenth amendment, "[l]ocal governmental units were regularly held to answer in damages for a wide range of statutory and constitutional violations . . . . Damage actions against municipalities for federal statutory violations were also entertained." *Owen v. City of Independence*, 445 U.S. 622, 639 and n.19 (1980). *See also Smith v. Robinson*, 463 U.S. 992, 1012 n.15 (1984). Congress in no way limited this admitted authority by passing a new law—Section 1983—extending federal court jurisdiction to additional wrongs. Moreover, this Court has held definitively that federal remedial power is not limited to cases involving "personal" or "individual" rights. *See, e.g., Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one.").

kind, the Ninth Circuit twice mistakenly held (using completely different rationales) that the City's conduct was not in conflict with federal labor law.[11] Labor preemption law is an area of substantial complexity, in which doctrinal developments almost guarantee that the lower courts will not be able to protect key federal rights through injunctive relief alone. Since 1983, this Court has issued ten labor preemption decisions,[12] and these decisions have yet to be assimilated into a coherent body of law by the lower courts. Losses resulting from these doctrinal developments, and lower court misunderstanding of this complex area of the law, cannot be allowed to fall upon innocent parties like Golden State rather than upon those who have violated federal law.[13]

If the decision below is allowed to stand, however, neither management nor labor will be able to combat improper municipal pressures. In the future, if injunctive

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[11] *See supra*, at 3-4.

[12] In addition to *Golden State*, first (*Garmon*) and second (*Machinists*) branch preemption cases have included (in chronological order) *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. 282 (1986); *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986); *Baker v. General Motors Corp.*, 478 U.S. 621 (1986); and *Fort Halifax Packing Co. v. Coyne*, —— U.S. ——, 107 S. Ct. 2211 (1987). Section 301 preemption cases have included *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Caterpillar Inc. v. Williams*, —— U.S. ——, 107 S. Ct. 2425 (1987); and *Lingle v. Norge Div. of Magic Chef, Inc.*, —— U.S. ——, 108 S. Ct. 1877 (1988).

[13] This is an even more pressing concern because labor preemption issues are likely to arise in state courts, which have even less familiarity with federal labor laws, and the policies underlying them, than their federal counterparts. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (properly pleaded state claim not removable to federal court on basis of federal preemption defense); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962) (state and federal courts have concurrent jurisdiction over Section 301 claims).

relief is improperly denied, or if appropriate relief is granted and then overturned (as occurred here), management or labor will have to yield because damages arising during the pendency of an appeal will not be recoverable. Golden State refused to accede to the City's unlawful edict, believing that the rights granted by Congress would be vindicated fully by the federal courts. Unless the decision below is reversed, no employer or labor union will make that assumption again, and no further appeals will be taken. The result will be not a dilution, but a negation, of the congressional regime of free collective bargaining.

II. THE RULING BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S INTERPRETATION OF 42 U.S.C. § 1983 AND TACITLY REVERSES THIS COURT'S PRIOR DECISION.

Judge Alarcon's concurrence, quoted at greater length above, is absolutely correct in concluding that the decision below "is inconsistent with the reasoning of the Supreme Court in *Wright v. Roanoke Redev. and Housing*, [479 U.S. 418] 107 S. Ct. 766 (1987)" and that "under *Wright*, Golden State would appear to have a cause of action for damages under section 1983." Pet. App., at 29a, 30a. The Ninth Circuit holding that Section 1983 relief is unavailable here is based upon two interrelated and equally incorrect propositions: first, that the NLRA grants Golden State no enforceable rights against the City, and second, that Section 1983 is applicable only where a "direct violation" of a federal statute occurs. Neither proposition has any foundation in this Court's jurisprudence; together, they have been used by the court below to reverse tacitly this Court's holding in *Golden State*.

In concluding that the National Labor Relations Act does not grant Golden State enforceable rights against the City, the Ninth Circuit attempted to fit this case into the exception from Section 1983 relief created in *Pennhurst State School and Hosp. v. Halderman*, 451 U.S.

1 (1981). The *Pennhurst* exception, however, is appropriate only where Congress merely has encouraged rather than mandated a result:

> In *Pennhurst*, a § 1983 action did not lie because the statutory provisions were thought to be only statements of "findings" indicating no more than a congressional preference—at most a "nudge in the preferred direction[n]," 451 U.S., at 19, and not intended to rise to the level of an enforceable right.

Wright v. City of Roanoke Redev. and Housing Auth., 479 U.S., at 423; *see also id.*, at 433 (O'Connor, J., dissenting).[14]

This Court's previous ruling in *Golden State* establishes that the *Pennhurst* exception does not apply here. Unlike *Pennhurst* cases, *see supra* note 14, this case does not involve a cooperative federalism or grant scheme in which federal monies are tied to a desirable but not mandatory norm. This Court's ruling in *Golden State* establishes that in passing and amending the National Labor Relations Act, Congress deliberately intended to prohibit municipal interference in the bargaining process. There can be no question that this absolute prohibition is statutory in origin:

> That such a condition—by a city or by the National Labor Relations Board—contravenes congressional intent *is demonstrated by the language of the NLRA and its legislative history. The NLRA requires an employer and a union to bargain in good faith, but it does not require them to reach agreement. § 8(d), as amended, 29 U.S.C. § 158(d)* (duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession")
>
> . . . .
>
> *A local government as well as the National Labor Relations Board*, lacks the authority to " 'introduce some standard of properly "balanced" bargaining power' . . . or to define 'what economic sanctions might be permitted negotiating parties in an "ideal" or "balanced" state of collective bargaining.' "

475 U.S., at 616, 619, Pet. App., at 9a, 12a-13a, (emphasis added; citations omitted). Neither can there be any doubt that Golden State, as an employer, was one of the parties for whose protection this preclusion was enacted;[15] Golden State certainly does not appear here as a member of the general public, incidentally benefited by a statute designed to enhance the public weal.

In contrast to this principled *Pennhurst* inquiry, which reveals that Golden State has a cause of action under Section 1983, the Ninth Circuit created an entirely new limitation upon Section 1983 by holding that such relief is unavailable unless state or local conduct "directly violates" a federal statute. This Court never has recognized any such limitation; neither has any other circuit court. As stated by Judge Alarcon, this new exception is in direct conflict with this Court's Section 1983 rulings, as exemplified by *Wright*, *supra*, which properly concentrate on "protecting the right secured by federal law, and not on whether all persons who might deprive another of the

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[14] *See also Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 20 (1981) (legislative history of act in question led to conclusion "that Congress intended to encourage, rather than mandate, the provision of better services to the developmentally disabled."); *Rosado v. Wyman*, 397 U.S. 397, 413 (1970) ("Congress sometimes legislates by innuendo, making declarations of policy and indicating a preference while requiring measures that though falling short of legislating its goals, serve as a nudge in the preferred directions."); *Samuels v. District of Columbia*, 770 F.2d 184, 195 (D.C. Cir. 1985) ("section 1983 will not lie to enforce vague policy sections of federal statutes intended only to advise, rather than to mandate"); *see also id.*, at 197, and cases cited therein.

[15] Section 1(b) of the Taft-Hartley Act, 29 U.S.C. § 141(b) (1982) states (in pertinent part):

> It is the purpose and policy of this chapter . . . to prescribe the legitimate rights of both employees and employers.

benefits of such statute are identified by Congress." Pet. App., at 30a.

The dangers of such a test are amply revealed in the decision below. The Ninth Circuit used its unprecedented "direct violation" test to set aside this Court's prior ruling by holding that the literal language of the NLRA, read in isolation, was not "directly violated" in this case.

> [T]his statute imposes "mutual obligation[s]" upon "the employer and the representative of its employees" to "bargain collectively" and "in good faith."
>
> . . . .
>
> Actions of a third-party, not employer or employee labor organization, do not give rise to a claim for damages against the third-party under these provisions.

Pet. App., at 24a.[16] And subsequently, the Ninth Circuit stated "we cannot say that the City's actions directly conflict with an 'explicit provision' of the NLRA—*the NLRA does not explicitly prohibit the City from acting in the area of labor relations. . . .*" Pet. App., at 27a (emphasis added).[17]

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[16] The Ninth Circuit's conclusion here is disingenuous. The quote above discusses only the unfair labor practice proscriptions of the NLRA, Sections 8(a) and 8(b) of the statute. Yet in the immediately preceding paragraph, the Ninth Circuit states:

> Here, the federal statute in question is the NLRA. *The provision at issue is section 8(d), as amended, 29 U.S.C. § 158(d).*

Pet. App., at 24a (emphasis added). The court below apparently shifted emphasis away from section 8(d) because this provision was the basis for this Court's ruling, as acknowledged by the Ninth Circuit:

> The Court concluded that Congress had preempted intrusion by "a local government" into the collective bargaining process *by enacting the NLRA, section 8(d), as amended, 29 U.S.C. § 158(d).*

Pet. App., at 19a (emphasis added).

[17] The Ninth Circuit's emphasis on the express language of the statute is markedly similar to Justice Rehnquist's dissent in this case, which also argued that the statute's literal language did not

The Ninth Circuit's fixation upon the express language of the statute trivializes the power of the federal courts —and particularly this Court—to interpret statutes, in light of legislative history, to achieve the results intended by Congress. We agree, of course, that Section 8(d) of the statute does not expressly state "there shall be no federal, state or local government interference with the bargaining process." But during the forty years since the Taft-Hartley Act was passed, this Court repeatedly has construed the NLRA and Section 8(d), in light of absolutely clear legislative history, to preclude all governmental interference with the bargaining process.[18] Most critically, as the Ninth Circuit admitted, *see* note 16, *supra*, this Court so held in this case. *See Golden State*, 475 U.S., at 616, 619, Pet. App., at 9a, 13a, ("[T]he language of the NLRA and its legislative history" established that "[t]he settlement condition imposed by the Los Angeles City Council . . . destroyed the balance of power designed by Congress, and frustrated

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support the Court's conclusions. It goes almost without saying that dissenting views cannot govern the resolution of this case. The proposition that a statute can be read by the Supreme Court in one fashion for purposes of liability and in a completely contrary fashion by the lower courts for remedial purposes has no foundation in the law, and requires the unprecedented assumption that Congress deliberately intended to create statutory rights that are not remediable. We suggest that the appropriate assumption—and one that finds overwhelming support in this Court's rulings—is that federal rights are fully remediable, under Section 1983 or otherwise, absent a clear congressional indication to the contrary.

[18] *See, e.g., H. K. Porter Co. v. NLRB*, 397 U.S. 99, 103-06 (1970) (reviewing legislative history of Labor Management Relations Act and concluding that Section 8(d) was intended to preclude the NLRB from compelling concessions in bargaining); *Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 149, 153 (1976) ("Our decisions hold that Congress meant that these activities, whether of employer or employees, were not to be regulable by States any more than by the NLRB. . . . [S]tate attempts to influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB.").

Congress' decision to leave open the use of economic weapons.").

The Ninth Circuit was not free, in light of this Court's ruling, to interpret Section 8(d) as a narrow definition of the parties' rights *inter se*. This Court has established that the statute in general, and Section 8(d) in particular, prohibits federal, state and local government interference in the bargaining process, and thus grants management and labor enforceable rights against governments. Injuries caused by breach of this statutory mandate must be remediable in damages.[19]

III. THE WRIT SHOULD ISSUE TO RESOLVE WHETHER SECTION 1983 RELIEF IS APPROPRIATE IN PREEMPTION CASES.

We believe that this petition should be granted, for the reasons stated above, to preserve Golden State's statutory rights, to reaffirm this Court's ruling and to prevent creation of a new and unauthorized exception to

[19] Section 1983 relief is not precluded here, because no "express provision or other specific evidence from the statute itself" demonstrates that Congress intended to foreclose Section 1983 relief. *Wright, supra*, 479 U.S., at 423-24; *and see id.* (" 'We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally secured right.") (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)). Congress has empowered the National Labor Relations Board to police the conduct of employers and unions; there is no statutory remedy available against municipalities. In the absence of some alternative private remedy or preclusive statutory language, it is impossible to conclude that Congress deliberately intended to foreclose judicial relief under Section 1983. *See Wright, supra*, 479 U.S., at 424-28 (preclusion appropriate only where Congress creates alternatives private remedy). It would be ironic indeed if the NLRB's jurisdiction, created to encourage "the practice and procedure of collective bargaining," were allowed to prevent effective protection of the collective bargaining process that forms "the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA." *Golden State*, 475 U.S., at 619, Pet. App., at 12a (quoting *New York State Tel. Co. v. New York Labor Dep't*, 440 U.S. 519, 551 (1979) (Powell, J., dissenting)).

Section 1983 relief. This case also presents the opportunity for this Court to resolve a recurrent and troublesome question: under what circumstances Section 1983 relief is appropriate in a preemption case. Neither this issue nor its sister—whether Section 1983 relief is appropriate in a Commerce Clause case—has been addressed by this Court, although three Justices voted to hear the Commerce Clause issue in *Private Truck Council of America, Inc. v. Quinn*, 476 U.S. 1129 (1986) (JJ. White, Brennan and O'Connor dissenting from denial of certiorari). These issues continue to produce conflicting results in the lower courts, and this case offers the Court the opportunity to clarify this confusion.[20]

The Ninth Circuit tacitly admitted that Section 1983 relief was available in a preemption case if the local government conduct was in direct and actual conflict with federal law. We agree with this proposition; unless such relief is available in preemption cases involving an actual federal-state conflict, state or local governments could penalize with impunity individuals who merely exercise their federal statutory rights. This conclusion follows directly from this Court's ruling in *Maine v. Thiboutot*, 448 U.S. 1 (1980), establishing that Section 1983 relief is available for federal statutory as well as constitutional violations. Because federal statutes are made binding upon state and local governments only by the Supremacy Clause, every Section 1983 case involving a federal statutory claim necessarily involves some form of preemption under the Supremacy Clause. The prop-

[20] *Compare Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982); *Kennecott Corp. v. Smith*, 637 F.2d 181 (3rd Cir. 1980) (Supremacy Clause and Commerce Clause claims arise under Section 1983) *with White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir.), *cert. denied*, 479 U.S. 1060 (1987); *Gould, Inc. v. Wisconsin Dep't of Industry*, 750 F.2d 608 (7th Cir. 1984), *aff'd on other grounds*, 475 U.S. 282 (1986); *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984) (Supremacy Clause and Commerce Clause claims do not arise under Section 1983).

osition that Section 1983 relief is never available in pre-emption cases thus cannot stand.[21]

Where the court below erred was not in its general analysis, but in its conclusion that this case did not involve an actual conflict between federal law and local action. In so ruling, the Ninth Circuit repeated the critical mistake noted above; it relied upon the literal words of the National Labor Relations Act, rather than this Court's binding interpretation of federal law.

> [W]e cannot say that the City's actions directly conflict with an "explicit provision" of the NLRA—*the NLRA does not explicitly prohibit the City from acting in the area of labor relations* . . . .

Pet. App., at 27a (emphasis added). Once again, however, the express language of the statute cannot determine whether a federal-state conflict exists, because the federal courts—and especially this Court—have the power and the duty to interpret the language used by Congress, in light of legislative history, to serve the legisla-

[21] This Court has delineated with great care the different types of preemption, *see Michigan Canners and Freezers Ass'n v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 469 (1984); *Brown v. Hotel and Restaurant Employees and Bartenders Int'l Union Local 54*, 468 U.S. 491 (1984), and has held that in cases involving actual conflict between federal law and state or local action, preemption follows "as a matter of substantive right." *Brown, supra*, 468 U.S., at 503.

We do not contend that Section 1983 relief is available in every preemption case; there are many preemption cases in which a state or local government acts in an area of pervasive federal regulation or interest, but does not contravene any specific federal statutory commands. If the federal government has not decreed how particular conduct is to be treated (in contrast to the situation here, where the labor laws specify that employer and union bargaining conduct is to be free from all government sanction), we do not propose that this Court recognize a generalized "right to be free from excessive state or local regulation in an area of federal interest," remediable under Section 1983. *Cf. Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979).

tive will. As discussed above, this Court repeatedly has used its interpretive powers to establish that Congress created a regime of private industrial dispute settlement, in which management and labor have the right to bargain free from government sanction.

Contrary to the decision below, Congress has not merely "occupied the field," preserving congressional lebensraum for future specific regulation. In *Brown v. Hotel and Restaurant Employees and Bartenders Int'l Union Local 54*, 468 U.S. 491 (1984), this Court explicitly held that "field preemption" was not involved in labor cases, 468 U.S., at 501, and stated:

> The Court has, however, frequently applied traditional pre-emption principles to find state law barred on the basis of *an actual conflict with § 7. If employee conduct is protected under § 7, then state law which interferes with the exercise of these federally protected rights creates an actual conflict and is pre-empted by direct operation of the Supremacy Clause.*

Id. (emphasis added).

While this case involves employer rather than employee rights, the result must be the same. This Court held that the City's conduct denied Golden State a specific right granted it it by Congress (" '[r]esort to economic weapons should more peaceful measures not avail' is the *right* of the employer as well as the employee, and 'the State may not prohibit the use of such weapons . . . any more than in the case of employees.' " 475 U.S., at 618, Pet. App., at 12a (emphasis added)). Indeed, the entire thrust of the *Machinists* preemption doctrine is to protect the specific congressional judgment that management and labor must be free to resolve their own disputes. It is difficult to imagine a more direct and actual conflict with this specific congressional judgment than local government action that destroys a lawful business because of its bargaining conduct.

Once again, we admit that the National Labor Relations Act does not expressly state "no city shall drive an employer out of business for refusal to settle a labor dispute." But there can be no doubt, in light of this Court's ruling, that Congress intended to create just such a prohibition. Where state or local conduct violates such a federal prohibition, and thus directly conflicts with federal law, normally available remedies—including relief under Section 1983—must be available.

CONCLUSION

Because the decision below directly conflicts with this Court's prior ruling, creates a new and unauthorized exception to Section 1983 relief and presents a recurrent and important federal question that should be resolved by this Court, a writ of certiorari should issue and the decision below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

No. 84-1644

GOLDEN STATE TRANSIT CORP.

v.

CITY OF LOS ANGELES

Certiorari to the United States Court of Appeals
for the Ninth Circuit

Argued December 4, 1985—Decided April 1, 1986

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C.J., and BRENNAN, WHITE, MARSHALL, POWELL, STEVENS, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 620 [13a].

Zachary D. Fasman argued the cause for petitioner. With him on the briefs was *Clifton S. Elgarten.*

John F. Haggerty argued the cause and filed a brief for respondent.*

JUSTICE BLACKMUN delivered the opinion of the Court.

The city of Los Angeles, Cal., refused to renew Golden State Transit Corporation's taxicab franchise after the company's drivers went on strike. We are asked to decide whether, under *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), the city's action is preempted by the National Labor Relations Act (NLRA), 29 U. S. C. § 151 *et seq.*

I

In 1980, Golden State, which operated taxicabs under the Yellow Cab name, applied to the city for a renewal of its operating franchise eventually scheduled to lapse on March 31, 1981. That franchise had first been acquired in 1977. On September 4, 1980, the city's Board of Transportation Commissioners recommended the renewal of Golden State's franchise—the largest, with approximately 400 cabs, of companies operating in Los Angeles—along with the franchises of 12 other taxi companies.

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* *Peter G. Nash, Dixie L. Atwater,* and *Stephen A. Bokat* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the National League of Cities et al. by *Rex E. Lee, Benjamin W. Heineman, Jr., Carter G. Phillips, Benna Ruth Solomon,* and *Joyce Holmes Benjamin;* and for the National Institute of Municipal Law Officers by *George Agnost, Roy D. Bates, Benjamin L. Brown, J. Lamar Shelley, John W. Witt,* and *Roger F. Cutler.*

Briefs of *amici curiae* were filed for the National Labor Relations Board by *Acting Solicitor General Fried, Deputy Solicitor General Wallace, Bruce N. Kuhlik, Norton J. Come, Linda Sher,* and *Robert C. Bell, Jr.;* and for the American Federation of Labor and Congress of Industrial Organizations by *David Silberman* and *Laurence Gold.*

In October, while the franchise renewal application was pending, Golden State's labor contract with its drivers expired. The company and the drivers, represented by Local 572 of the International Brotherhood of Teamsters, signed a short-term contract in order that operations would continue while negotiation and mediation proceeded. This interim contract was to expire at midnight February 10, 1981, the day before the City Council was scheduled to consider action on the franchise renewals.

On February 2, the Council's Transportation and Traffic Committee endorsed franchise renewals recommended by the Board of Transportation Commissioners. The Committee's report stated that Golden State and other companies were "in compliance with all terms and conditions of their franchise[s]." App. 39.

On February 11, the drivers struck Golden State, halting its operations. At the Council meeting that day, Teamster representatives argued against renewal of Golden State's franchise because of the pendency of the labor dispute. The Council postponed decision on Golden State's application until February 17, but, with possibly one exception, approved all other franchise renewal applications. At the February 17 meeting, when the union again opposed the renewal, the Council voted to extend Golden State's franchise from March 31 to April 30, but only if the Council expressly found, on or before March 27, that the extension was in the best interests of the city.

At its March 23 meeting, the Council held a short public hearing on whether it should grant the limited extension. By this time, the labor dispute and the franchise renewal issue had become clearly intertwined. The Teamsters opposed any extension of the Yellow Cab franchise, stating that such action would simply lengthen the strike and keep the drivers out of work. It pre-

ferred to see the franchise terminated, and to have the drivers seek jobs from Golden State's successor or from other franchise holders. As others spoke, the discussion turned to whether there was even a need for Yellow Cab, in light of the services performed by the other 12 franchised taxi companies. There were comments regarding an excess of cabs; the city's policy at the time, however, was not to limit the number of taxi companies or the number of taxis in each fleet. *Id.*, at 81-82.

The strike was central to the discussion. One Council member charged Golden State with negotiating unreasonably, *id.*, at 71, while another accused the company of trying to "brea[k] the back of the union." *Id.*, at 66. The sympathies of the Council members who spoke lay with the union. But rather than defeat the renewal outright, the council reached a consensus for rejection of the extension with a possibility for reopening the issue if the parties settled their labor dispute before the franchise expired the following week. Four Council members endorsed this approach, and the Assistant City Attorney said that he clearly had informed the parties that this was the city's position. *Id.*, at 68. The Council President said: "I find that it will be very difficult to get this ordinance past (sic) to extend this franchise if the labor dispute is not settled by the end of this week." *Id.*, at 75. He added: "I just think that this kind of information should be put out in the open, so everybody understands it." *Ibid.* The Council, by a vote of 11 to 1, defeated the motion to extend the franchise and it expired by its terms on March 31.

II

Golden State filed this action in the United States District Court for the Central District of California, alleging that the city's action was pre-empted by the NLRA and violated the company's rights to due process and equal protection. It sought declaratory and injunctive relief and damages. The District Court found that

it was "undisputed that the sole basis for refusing to extend [Golden State's] franchise was its labor dispute with its Teamster drivers," 520 F. Supp. 191, 193 (1981); that the Council had "threaten[ed] to allow Yellow Cab's franchise to terminate unless it entered into a collective bargaining agreement with the Teamsters," *id.*, at 194; and that the Council had denied the company an essential weapon of economic strength—the ability to wait out a strike. On the basis of the pre-emption claim, the District Court granted Golden State's motion for a preliminary injunction to preserve the franchise. *Ibid.* The Court of Appeals for the Ninth Circuit found "ample evidence" in the record to support the District Court's finding, but nevertheless vacated the injunction. 686 F.2d 758, 759, 762 (1982). The court reasoned that Golden State had little chance of prevailing on its pre-emption claim or on the other grounds it asserted. This Court denied Golden State's petition for certiorari. 459 U. S. 1105 (1983).

Following litigation on unrelated issues,[1] and with the company having abandoned its equal protection claim, the District Court granted summary judgment for the city. App. to Pet. for Cert. 11a. Golden State had not moved for summary judgment in its favor. The Court of Appeals affirmed, holding that the city's action was not pre-empted. 754 F.2d 830 (1985). The court felt that, when the activity regulated is only a peripheral or incidental concern of labor policy, traditional municipal regulation is not pre-empted. The court found nothing in the record to suggest that the city's nonrenewal decision "was not concerned with transportation." *Id.*, at 833. Moreover, to avoid undue restriction of local regulation, "only ac-

[1] Antitrust claims were asserted in a second amended complaint filed by Golden State. The District Court granted the city partial summary judgment as to these claims, 563 F. Supp. 169 (CD Cal. 1983), and the Court of Appeals affirmed. 726 F.2d 1430 (CA9 1984). We again denied certiorari. 471 U.S. 1003 (1985).

tions seeking to directly alter the substantive outcome of a labor dispute should be pre-empted." Here, the city had not attempted to dictate the terms of the agreement, but had "merely insisted upon resolution of the dispute as a condition to franchise renewal." *Ibid.* The Court of Appeals also rejected Golden State's due process claim. *Id.*, at 833-834.[2] Because of our concern about the propriety of the grant of summary judgment for the city in this factual and labor context, we granted certiorari. 472 U.S. 1016 (1985).[3]

III

A

Last Term, in *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724 (1985), we again noted: "The Court has articulated two distinct NLRA pre-emption principles." *Id.*, at 748. See also *Belknap, Inc.* v. *Hale*, 463 U. S. 491, 498-499 (1983). The first, the so-called *Garmon* pre-emption, see *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), prohibits States

[2] One judge concurred in the majority's due process analysis but otherwise concurred only in the judgment. As to pre-emption, he would have granted summary judgment for the city on the ground that Golden State had failed to provide evidence of the city's motive or of the economic impact on Golden State. 754 F.2d, at 834.

[3] The city contends that the case is moot because the franchise, if renewed, would have expired on March 31, 1985. But if petitioner's franchise renewal had been granted in 1981, petitioner would have faced a renewal procedure in 1985 rather than the more onerous task of obtaining a franchise through competitive bidding. See Tr. of Oral Arg. 25-26. But for the nonrenewal in 1981, Golden State would be more likely to have an operating franchise now. At oral argument, counsel for Golden State said the company was ready to resume operations, even though it was in Chapter 11 bankruptcy. *Id.*, at 5. It therefore cannot be said that "[i]ntervening events have . . . 'irrevocably eradicated the effects of the alleged violation.'" *Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983), quoting *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979). We conclude, therefore, that the case is not moot.

from regulating "activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wisconsin Dept. of Industry* v. *Gould Inc.*, *ante*, at 286. The *Garmon* rule is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the "integrated scheme of regulation" established by the NLRA. *Ante*, at 289. See *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S., at 748, and n. 26.

This case, however, concerns the second pre-emption principle, the so-called *Machinists* pre-emption.[4] See *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132 (1976). This precludes state and municipal regulation "concerning conduct that Congress intended to be unregulated." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S., at 749.[5] Although the labor-management relationship is structured by the NLRA, certain areas intentionally have been left " 'to be controlled by the free play of economic forces.' " *Machinists*, 427 U. S., at 140, quoting *NLRB* v. *Nash-Finch Co.*, 404 U. S. 138, 144 (1971). The Court recognized in *Machinists* that " 'Congress has been rather specific when it has come to outlaw particular economic weapons,' " 427 U.S., at 143, quoting *NLRB* v. *Insurance Agents*, 361 U. S. 477, 498

[4] We do not reach the question whether the city's action in this case is pre-empted under *Garmon*, because Golden State and its supporting *amici*, including the NLRB, rely exclusively on the *Machinists* doctrine, and we find their argument persuasive.

[5] Our pre-emption analysis is not affected by the fact that we are reviewing a city's actions rather than those of a State. See *Fisher* v. *Berkeley*, *ante*, at 265. And the fact that the city acted through franchise procedures rather than a court order or a general law also is irrelevant to our analysis. "[J]udicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 243 (1959). See *Wisconsin Dept. of Industry* v. *Gould Inc.*, *ante*, p. 282.

(1960), and that Congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance "'between the uncontrolled power of management and labor to further their respective interests.'" *Machinists*, 427 U. S., at 146, quoting *Teamsters* v. *Morton*, 377 U. S. 252, 258-259 (1964). States are therefore prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts, see 427 U. S., at 147, unless such restrictions presumably were contemplated by Congress. "Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding pre-emption is the same: whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.'" *Id.*, at 147-148, quoting *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 380 (1969).

B

There is no question that the Teamsters and Golden State employed permissible economic tactics. The drivers were entitled to strike—and to time the strike to coincide with the Council's decision—in an attempt to apply pressure on Golden State. See *NLRB* v. *Insurance Agents*, 361 U. S., at 491, 496. And Golden State was entirely justified in using its economic power to withstand the strike in an attempt to obtain bargaining concessions from the union. See *Belknap, Inc.* v. *Hale*, 463 U. S., at 493, 500 (employer has power to hire replacements during an economic strike); *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 318 (1965) (at bargaining impasse employer may use lockout solely to bring economic pressure on union).

The parties' resort to economic pressure was a legitimate part of their collective-bargaining process. *Machinists*, 427 U. S., at 144. But the bargaining process was thwarted when the city in effect imposed a positive dura-

tional limit on the exercise of economic self-help. The District Court found that the Council had conditioned the franchise on a settlement of the labor dispute by March 31. We agree with the Court of Appeals that this finding is amply supported by the record.[6] The city's insistence on a settlement is pre-empted if the city "'[entered] into the substantive aspects of the bargaining process to an extent Congress has not countenanced.'" *Machinists*, 427 U. S., at 149, quoting *NLRB* v. *Insurance Agents*, 361 U. S., at 498.

That such a condition—by a city or the National Labor Relations Board—contravenes congressional intent is demonstrated by the language of the NLRA and its legislative history. The NLRA requires an employer and a union to bargain in good faith, but it does not require them to reach agreement. § 8(d), as amended, 29 U.S.C. § 158(d) (duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession"); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) ("The theory of the Act is that free opportunity for negotiation . . . may bring

[6] The District Court's finding is supported by objective factors such as what the city—through the Council and the Assistant City Attorney—told the parties, and its schedule of Council meetings. At the meeting of March 23, 1981, four Council members without contradiction pointedly conveyed the settlement condition to the parties as the Council's "bottom line" on the issue. The condition also was announced to the parties by the Council's agent, the Assistant City Attorney, revealing that the condition was city policy. Moreover, the condition was evident from the schedule on which the Council considered the question. Golden State's franchise issue was deferred from February 11 to the 17th, from February 17 to March 23, and from March 23 to the 31st. Only Golden State, among the franchise applicants, was subjected to a conditional 1-month extension of its franchise. The only plausible reason for these repeated short extensions is that the city was giving the franchise holder additional time to comply with a particular requirement. Yet Golden State was in compliance with all the terms of the franchise except the Council's desire for a settlement.

about the adjustments and agreements which the Act in itself does not attempt to compel").

The Act leaves the bargaining process largely to the parties. See *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99, 103 (1970). It does not purport to set any time limits on negotiations or economic struggle. Instead, the Act provides a framework for the negotiations; it "is concerned primarily with establishing an equitable process for determining terms and conditions of employment." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S., at 753. See also § 1, as amended, of the NLRA, 29 U.S.C. § 151 (Act achieves national policy "by encouraging the practice and procedure of collective bargaining").

The legislative history, too, makes clear that the Act and the National Labor Relations Board were intended to facilitate bargaining between the parties. The Senate Report states: "Disputes about wages, hours of work, and other working conditions should continue to be resolved by the play of competitive forces . . . . This bill in no respect regulates or even provides for supervision of wages or hours, nor does it establish any form of compulsory arbitration." S. Rep. No. 573, 74th Cong., 1st Sess., 2 (1935). Senator Wagner, sponsor of the NLRA, said that the Board would not usurp the role of free collective action. See 79 Cong. Rec. 6184 (1935). See also *id.*, at 7574 (Sen. Wagner affirming that the Act encourages "voluntary settlement of industrial disputes").

Protecting the free use of economic weapons during the course of negotiations was the rationale for this Court's findings of pre-emption in *Machinists* and in its predecessor, *Teamsters* v. *Morton*, 377 U.S. 252 (1964). In some areas of labor relations that the NLRA left unregulated, we have concluded that Congress contemplated state regulation. See *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S., at 754-758; *New York Tel. Co.* v. *New York Labor Dept.*, 440 U.S. 519, 540-544 (1979)

(plurality opinion); *id.*, at 547 and 549 (opinions concurring in result and concurring in judgment). Los Angeles, however, has pointed to no evidence of such congressional intent with respect to the conduct at issue in this case.[7]

Instead, the city argues that it is somehow immune from labor pre-emption solely because of the nature of its conduct.[8] The city contends it was not regulating labor, but simply exercising a traditional municipal function in issuing taxicab franchises. We recently rejected a similar argument to the effect that a State's spending decisions are not subject to pre-emption. See *Wisconsin Dept. of Industry* v. *Gould Inc.*, *ante*, at 287-288. Cf. *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S., at 754-758. Similarly, in the transportation area, a State may not ensure uninterrupted service to the public by prohibiting a strike by the unionized employees of a privately owned local transit company. See *Bus Employees* v. *Missouri*, 374 U.S. 74 (1963); cf. *Bus Employees* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 391-392 (1951). Nor in this case may a city restrict a transportation employer's ability to resist a strike. Although in each *Bus Employees* case the employees' right

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[7] There is no issue here that, rather than regulating the relationship between the employee and the union, the city's action protected innocent third parties from the employer. See *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 500 (1983) (third parties hired as strike replacements based on misrepresentations by the employer had state-law causes of action).

[8] The Court of Appeals, in holding that the city's action was not pre-empted, reasoned that what the city did involved merely a peripheral concern of federal labor law. The idea that state action may be upheld under such circumstances is part of the *Garmon* analysis. See *Belknap, Inc.* v. *Hale*, 463 U.S., at 498-499. Because we hold that the city directly interfered with the bargaining process—a central concern of the NLRA—we need not reach the question whether this exception applies to a *Machinists* case. But see *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 754-758 (1985).

to strike was protected by § 7, as amended, of the NLRA, 29 U.S.C. § 157, "'[r]esort to economic weapons should more peaceful measures not avail' is the right of the employer as well as the employee," and "the State may not prohibit the use of such weapons . . . any more than in the case of employees." *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S., at 147, quoting *American Ship Building Co.* v. *NLRB*, 380 U.S., at 317. "[F]ederal law intended to leave the employer and the union free to use their economic weapons against one another." *Belknap, Inc.* v. *Hale*, 463 U.S., at 500. We hold, therefore, that the city was pre-empted from conditioning Golden State's franchise renewal on the settlement of the labor dispute.

The city, however, contends that it was in a no-win situation: having not renewed the franchise and thus permitting it to lapse, it stands accused of favoring the union; had it granted the renewal, it would have been accused of favoring the employer. But the question is not whether the city's action favors one side or the other. Our holding does not require a city to renew or to refuse to renew any particular franchise. We hold only that a city cannot condition a franchise renewal in a way that intrudes into the collective-bargaining process.

C

"Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA." *New York Tel. Co.* v. *New York Labor Dept.*, 440 U.S., at 551 (POWELL, J., dissenting). Even though agreement is sometimes impossible, government may not step in and become a party to the negotiations. See *H. K. Porter Co.* v. *NLRB*, 397 U.S., at 103-104. A local government, as well as the National Labor Relations Board, lacks the authority to "'introduce some standard of properly "balanced" bargaining power' . . . or to define 'what economic

sanctions might be permitted negotiating parties in an "ideal" or "balanced" state of collective bargaining.'" *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S., at 149-150, quoting *NLRB* v. *Insurance Agents*, 361 U.S. 477, 497-500 (1960). The settlement condition imposed by the Los Angeles City Council, as we read the summary-judgment record before us, destroyed the balance of power designed by Congress, and frustrated Congress' decision to leave open the use of economic weapons.

In this case, the District Court and the Court of Appeals found that the city had conditioned the renewal of Golden State's franchise on the company's reaching a labor agreement with the Teamsters, but held that the city's action was not pre-empted by *Machinists*. This was error as a matter of law. Whether summary judgment should have been entered for Golden State is a matter we do not decide, for petitioner made no motion for summary judgment on the issue of pre-emption.

The Court of Appeals' judgment affirming the summary judgment entered for the city is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST, dissenting.

The city of Los Angeles refused to renew Golden State's taxicab franchise unless it settled a labor dispute with its drivers. The Court of Appeals for the Ninth Circuit stated that "[n]othing in the record indicates that the City's refusal to renew or extend Golden State's franchise until an agreement was reached and operations resumed was not concerned with transportation." 754 F.2d 830, 833 (1985). Nonetheless, the Court today holds that "a city cannot condition a franchise renewal in a way that intrudes into the collective-bargaining process." *Ante*, at 619 [12a]. The extraordinary breadth of the

Court's holding is best illustrated by comparing it to this Court's initial cases involving federal labor pre-emption.

In *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767 (1947), this Court addressed the permissible scope of state regulation of labor disputes by examining New York's so-called Little Wagner Act, under which foremen were permitted to unionize. The status of foremen under the federal Act had been a matter of dispute at the time that New York asserted its right to supervise the organization of a union of foremen at the Bethlehem Steel Company plant in that State. See *id.*, at 770. The State argued that its labor relations machinery could operate at least until similar benefits for foremen were sought by the union under the federal Act. See *id.*, at 771. This Court held that the federal law pre-empted the state law on this point; both dealt with exactly the same subject matter and whether or not they were the same or different with respect to the permissibility of organizing foremen made no difference. *Id.*, at 775. If they were the same, the procedures were duplicative. *Id.*, at 776. If they were different, they were potentially antagonistic. *Ibid.*

Six years later, in *Garner* v. *Teamsters*, 346 U.S. 485 (1953), the Court was presented with a claim of pre-emption under the Taft-Hartley Act, which imposed regulations and duties on labor correlative to the those imposed on management by the Wagner Act. The case involved unionized drivers who had engaged in conduct clearly prohibited by the Taft-Hartley Act, which might have made them subject to a cease-and-desist order by the National Labor Relations Board. See *id.*, at 486-487. But instead of resorting to the federal agency, the employer successfully sought an injunction against the prohibited picketing from a Pennsylvania state court. See *id.*, at 487. This Court held that state duplication of remedies provided by the National Labor Relations Act was pre-empted even though the state remedy was provided by a court rather than a state labor agency. See *id.*, at 487, 499-501.

The opinions in both *Bethlehem Steel* and *Garner* observed that Congress had furnished no guidance to the Court as to whether or not state regulation should be pre-empted:

> "Congress has not seen fit to lay down even the most general of guides to construction of the Act, as it sometimes does, by saying that its regulation either shall or shall not exclude state action." *Bethlehem Steel, supra*, at 771.

> "The national Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much." *Garner, supra*, at 488 (footnote omitted).

The Court stated in both that it was forced simply to divine the will of Congress by implication:

> "[The] exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting." *Bethlehem Steel, supra*, at 772.

> "We must spell out from conflicting indications of congressional will the area in which state action is still permissible." *Garner, supra*, at 488.

From the acorns of these two very sensible decisions has grown the mighty oak of this Court's labor pre-emption doctrine, which sweeps ever outward though still totally uninformed by any express directive from Congress. The National Labor Relations Board, organized management, and organized labor have vied with each other in urging the Court to sweep into the maw of labor relations law concerns that would have been regarded as totally peripheral to that body of law by the Congresses which enacted the Wagner Act and the Taft-Hartley Act.

Today we are told that a city, not seeking to place its weight on one side or the other of the scales of economic warfare, may not condition the renewal of a taxicab franchise on the settlement of a labor dispute. The settlement of that dispute would have enabled the company to put its taxis back on the streets where the franchise presumably contemplated they would be. The Court says that since the Labor Board may not structure an ideal balance of collective-bargaining weapons, the city may not consider the existence of a labor dispute in deciding whether to renew a franchise. See *ante*, at 619-620 [12a-13a]. We are further told that because a State may not legislate to provide uninterrupted service to the public by prohibiting a strike of public utility employees, a city may not act upon its views of sound transportation policy to refuse to renew a taxi franchise unless the franchisee settles a labor dispute and returns its cabs to the purpose for which the franchise exists. See *ante*, at 617-618 [11a-12a]. Such sweeping generalizations commend themselves neither to common sense nor to whatever hypothetical "intent of Congress" as can be discerned in an area so remote from the core concerns of labor-management relations addressed by federal labor law.

Federal pre-emption of state law is a matter of congressional intent, presumed or expressed. Because Congress cannot foresee the various ways in which state laws might rub up against the operation of federal statutes, the Court in a multitude of cases has held state regulation pre-empted even when Congress has not expressed any intent to pre-empt because of the danger that the existence of federal and state regulations side by side will interfere with the achievement of the objectives of the federal legislation. The entire body of this Court's labor law pre-emption doctrine has been built on a series of implications as to congressional intent in the face of congressional silence, so that we now have an elaborate pre-emption doctrine traceable not to any expression of

Congress, but only to statements by this Court in its previous opinions of what Congress must have intended.

The Court today doffs its hat to the legislative history of the Wagner Act and comes up with the following three items:

> "[1] The Senate Report states: 'Disputes about wages, hours of work, and other working conditions should continue to be resolved by the play of competitive forces . . . . This bill in no respect regulates or even provides for supervision of wages or hours, nor does it establish any form of compulsory arbitration.'
>
> "[2] Senator Wagner, sponsor of the NLRA, said that the Board would not usurp the role of free collective action.
>
> "[3] Senator Wagner affirm[ed] that the Act encourages 'voluntary settlement of industrial disputes.'" *Ante*, at 617 [10a] (citations omitted).

These three bits of legislative history furnish absolutely no support for the result of the Court reaches today. The observations that the Wagner Act leaves it to the parties to resolve their disputes by the play of competitive forces, that the Labor Board would not usurp the role of free collective action, and that the Act encourages voluntary settlement of industrial disputes, simply do not speak to the question whether a city may condition the renewal of a taxicab franchise on the settlement of a labor dispute. I do not believe that Congress intended the labor law net to be cast this far, and I therefore dissent.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-6074

D.C. No. CV-81-1519-AAH

GOLDEN STATE TRANSIT CORP., a California corporation,
d/b/a Yellow Cab of Los Angeles,
Plaintiff-Appellant,

v.

CITY OF LOS ANGELES, a municipal corporation,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
A. Andrew Hauk, District Judge, Presiding

Argued and Submitted
February 2, 1988—Pasadena, California

Filed September 15, 1988

Before: J. Clifford Wallace, Arthur L. Alarcon and
Robert R. Beezer, Circuit Judges.

Opinion by Judge Beezer; Concurrence by Judge Alarcon

Zachary D. Fasman and Ward L. Smith, Crowell & Moring, Washington, D.C., for the plaintiff-appellant.

John F. Haggerty, Assistant City Attorney, Los Angeles, California, for the defendant-appellee.

OPINION

BEEZER, Circuit Judge:

In *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 618 (1986), the Supreme Court held, that the City of Los Angeles ("City") could not condition renewal of a taxi company's franchise on settlement of a labor dispute. The Court observed that such an action "destroyed the balance of power designed by Congress [in the National Labor Relations Act], and frustrated Congress' decision to leave open the use of economic weapons." *Id.* at 619. The Court concluded that Congress had preempted intrusion by "a local government" into the collective bargaining process by enacting the NLRA, section 8(d), as amended, 29 U.S.C. § 158(d). The case was remanded to the district court for further proceedings.

On remand, appellant Golden State Transit Corporation ("Golden State") sought damages from the City for nonrenewal of its franchise. The district court concluded that it had the authority to grant injunctive relief and also ancillary monetary relief, but that it did not have the authority to grant compensatory damages under 42 U.S.C. § 1983, based on an alleged NLRA violation or Supremacy Clause pre-emption. The Court also found that it did not have the authority to award damages under any inherent power it possessed. The district court certified the question for interlocutory appeal. Golden State has appealed.

We affirm.

I

On April 1, 1986, the Supreme Court concluded that the City's decision to condition renewal of the settlement of a labor dispute could be enjoined under the National Labor Relations Act ("NLRA"). *Golden State*, 475 U.S.

at 619-20. The facts preceding the Supreme Court decision are as follows:

In early 1980, Golden State, which operated a taxicab company, applied to the City for renewal of an operating franchise. Golden State operated 400 cabs. The franchise was due to expire on March 31, 1981.

In October 1980, before the renewal decision was taken up by the City, a labor contract with Golden State's drivers expired. A short-term labor contract was negotiated between Golden State and its drivers, to end on February 10, 1981.

On February 11, 1981, Golden State's drivers struck. In view of the strike, the City postponed action on renewal of Golden State's franchise until February 17, 1981.

On February 17, 1981, the City Council decided to extend Golden State's franchise from March 31, 1981 to April 30, 1981, on condition that, prior to March 27, 1981, the Council decided that such an extension was in the best interests of the City. On March 23, 1981, the Council held a public hearing on the "best interests" question. The dominant issue discussed at the hearing was the drivers' strike.

For a variety of reasons, the Council decided to condition renewal of Golden State's taxicab franchise on settlement of its labor dispute. *See Golden State*, 475 U.S. at 610-11. A subsequent motion to extend the franchise was defeated.

On March 31, 1981, the Golden State Taxicab franchise expired.

In federal court, Golden State sought injunctive relief and damages from the City. The district court found "undisputed [the fact] that the sole basis for refusing to extend [Golden State's] franchise was its labor dispute with its . . . drivers," 520 F. Supp. 191, 193 (C.D. Cal. 1981). The court also found that the City had "threaten[ed]" to terminate the franchise unless Golden State settled its labor dispute, *id.* at 194, and that the City had denied Golden State an "essential weapon of economic strength—the ability to wait out a strike." *Golden State*, 475 U.S. at 611-12.

On the basis of Golden State's claim that the NLRA preempted the City's intrusion into the collective bargaining process, the district court granted Golden State's motion for a preliminary injunction.

On appeal by the City, we found "ample evidence" to support the injunction, but dissolved it after concluding that Golden State had only a small likelihood of prevailing on the merits. *Golden State*, 686 F.2d 758, 761-62 (9th Cir. 1982). Golden State's petition for certiorari was denied by the Supreme Court. *Golden State*, 459 U.S. 1105 (1983).

Thereafter, the district court granted summary judgment for the City. We affirmed this decision, holding that the City's intrusion was not preempted by Congress' enactment of the NLRA. *Golden State*, 754 F.2d 830, 832 (9th Cir. 1985). The Supreme Court reversed and remanded. The Supreme Court held that, under *International Ass'n of Machinists and Aerospace Workers, AFL-CIO* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), the City's action interfered with "'the free play of economic forces' [citation omitted]" in collective bargaining between the company and its drivers, *Golden State*, 475 U.S. at 614, and that such a local action—conditioning franchise renewal on labor dispute settlement—was precluded, since collective bargaining was precisely the conduct which "'Congress intended to be unregulated.'" *Golden State*, 475 U.S. at 614, quoting *Metropolitan Life Ins. v. Massachusetts*, 471 U.S. 724, 749 (1985). The Supreme Court agreed

with Golden State that the NLRA preempted this action by the City.

On remand, the district court ordered the City to grant Golden State a four-year franchise and ancillary monetary relief sufficient to "salvage" Golden State. The court determined that the ancillary relief would be limited to the fair market value of Golden State's assets as of the date of the City's action, less any sum Golden State received pursuant to bankruptcy proceedings.

During remand proceedings, the district court ordered briefing and argument on the question whether it had authority to grant additional compensatory damages to Golden State.

Following full briefing and argument, the district court concluded that it did not have authority to grant further compensatory damages. The court cited three reasons: First, Golden State was not entitled to damages under 42 U.S.C. § 1983 for the alleged NLRA "violation" by the City. Second, while the Supremacy Clause preempted State law, it did not entitle Golden State to damages under 42 U.S.C. § 1983. Third, the district court had no inherent authority to award further damages.

On April 23, 1987, the district court stayed trial on the amount of ancillary monetary relief to certify the compensatory damage question for interlocutory appeal.

Golden State timely appeals. We have jurisdiction pursuant to 28 U.S.C. § 1292(b).

II

On appeal, Golden State claims, first, that compensatory damages are available under 42 U.S.C. § 1983, as a result of the City's denial of rights created under the NLRA. Second, Golden State claims that the Supremacy Clause entitles it to an award of damages under section 1983, since there was "direct and actual conflict" between

the City's conduct and federal law. Finally, Golden State claims that federal courts have inherent authority to award complete relief where federal statutory or constitutional rights are violated, and that such rights are violated here.

A

Golden State first premises its section 1983 claim for compensatory damages on the City's alleged "violation" of the NLRA.

Golden State claims that the City's denial of the NLRA-conferred "right" to unregulated settlement of its labor dispute creates an entitlement, under section 1983, to damages against the City.

Golden State observes that section 1983 permits recovery for "violation" of a federal statute where that statute creates substantive, enforceable rights. *See Maine v. Thiboutot*, 448 U.S. 1 (1980) (violation of statute by failure to consider specific factors relevant to aid for dependent children permits section 1983 relief); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) (section 1983 provides cause of action where rights are "secured" by laws of United States).

Golden State argues that the NLRA, specifically section 8(d), as amended, 29 U.S.C. § 158(d), grants "secured rights" protected by 42 U.S.C. § 1983, and that the City has "violated" these rights, thus entitling Golden State to section 1983 damages from the City. We disagree.

In *Wright v. Roanoke Redevelopment and Housing*, 479 U.S. 418 (1987), the Supreme Court noted that there are "two exceptions to the application of section 1983 to remedy statutory violations: where Congress has foreclosed such enforcement of the statute in the enactment itself[,] and where the statute did not create enforceable rights, privileges, or immunities within the meaning of section 1983." *Id.* at 422.

Against the backdrop of *Wright*, and decisions of this court, it is clear that no such right, privilege or immunity secured by the NLRA was "violated" by the City in this instance.

Equally clear is the fact that Congress has preempted this field, limiting recovery for unfair labor practices to remedies specifically provided in the NLRA.

(1)

In *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir. 1984), *cert. denied*, 107 S. Ct. 940 (1987), we stated "[s]ection 1983, as interpreted in *Thiboutot* [citations omitted] and its progeny, enforces federal statutory rights only against direct violations of the federal statute in question." 810 F.2d at 851, n.9; *see also Pennhurst*, 451 U.S. at 28; *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981) (section 1983 requires that "a federal statute [be] . . . violated").

Here, the federal statute in question is the NLRA. The provision at issue is section 8(d), as amended, 29 U.S.C. § 158(d).

Generally, this statute imposes "mutual obligation[s]" upon "the employer and the representative of the employees" to "bargain collectively" and "in good faith."

Specifically, 29 U.S.C. §§ 158(a) and (b) impose obligations on "an employer" and on "a labor organization." Actions of a third-party, not employer or employee labor organization, do not give rise to a claim for damages against the third-party under these provisions.

Since the City was at no time party to the collective bargaining agreement, the City cannot be subject to a section 1983 action premised on a party's alleged violation of 29 U.S.C. § 158. We do not believe that the NLRA was intended to transform actions of third-parties', neither employer nor employee labor organization, into "violations" by "an employer" or "a labor organization" under the statute.

Since there is no "direct violation" of the NLRA, we conclude that there is no entitlement to additional compensatory damages from the City under section 1983.

(2)

Even if the City were subject to the NLRA, and City's actions directly "violated" the NLRA, section 1983 damages would be unavailable, since Congress' enactment of the NLRA has preempted this field.

Applying the test set out in *Sea Clammers*, 453 U.S. at 20, cited with approval in *Wright*, we conclude that "the remedial devices provided in [the statute] are sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under section 1983." 479 U.S. at 423.

In a similar case, involving a cause of action brought by trustees for an employment benefit trust under 29 U.S.C. § 158(d), we noted:

> We do not reach the merits of the trustees' section 8(d) [section 158(d)] theory, however, for we have recently held that the federal courts lack jurisdiction to consider claims based on violations of section 8(d) [section 158(d)] of the NLRA. *Exclusive jurisdiction* over section 8(d) [section 158(d)] claims rests with the National Labor Relations Board. *Arizona Laborers, Teamsters & Cement Masons Local 395 Health & Welfare Trust Fund v. Conquer Cartage Co.*, 753 F.2d 1512, 1515-17 (9th Cir. 1985).

Waggoner v. Dallaire, 767 F.2d 589, 592 (9th Cir. 1985), *cert. denied*, 475 U.S. 1064 (1986).

Since the City did not violate a provision of the NLRA, and since Congress has limited relief for such an action

to the NLRA, we conclude that section 1983 damages are not available here.

B

Golden State claims that the district court erred in concluding that it had no authority to grant section 1983 damages based on the Supremacy Clause.[1]

The district court concluded that, in *White Mountain Apache*, we expressly held that the preemption of state law under the Supremacy Clause would not support a cause of action under section 1983.

In *White Mountain Apache*, we held that the Supremacy Clause "is not a rights conferring provision that protects the individual against government intrusion." 810 F.2d at 848. We also held that "preemption of state law under the Supremacy Clause—at least if based on federal occupation of the field or conflict with federal goals—will not support an action under section 1983 . . . ." *Id.* at 850. "Explicit provisions of federal law" would need to be at issue in order to trigger consideration of section 1983 damages. *Id.* 850.

In the case *sub judice*, the Supreme Court concluded that the City's action had frustrated Congress' intent to permit free bargaining between parties to a labor contract. *Golden State*, 475 U.S. at 615. The City's action was preempted not because it conflicted with a federal regulation, but because Congress intended to create an unregulated preserve for free labor-management negotiation. *Id.* at 614-15. This conclusion was pronounced by the Supreme Court, after a thorough analysis of the NLRA's language and legislative history. *Id.* at 616-17.

Since the City's actions "destroyed the balance of power designed by Congress, and frustrated Congress' decision

[1] The Supremacy Clause of the United States Constitution, Article VI, provides: "This Constitution, and the Laws of the United States . . . shall be the Supreme Law of the Land."

to leave open the use of economic weapons," *id.* at 619, the Supreme Court concluded that the City's action was in conflict with federal goals embraced by Congress upon enactment of the NLRA. Specifically, the goal at the center of the NLRA—collective bargaining free of government intervention.

Since we cannot say that the City's actions directly conflict with an "explicit provision" of the NLRA—the NLRA does not explicitly prohibit the City from acting in the area of labor relations—and since the Supreme Court identified only a conflict with the NLRA's "goal" of free collective bargaining (to be remedied by injunction and ancillary monetary relief), we are bound by our own holding in *White Mountain Apache*, 810 F.2d at 850.

We conclude that Golden State is not entitled to section 1983 damages on the basis of Supremacy Clause preemption.

C

Golden State argues that, absent the right to recovery under section 1983, a federal court may award damages on the basis of its "inherent powers."

Inherent powers of the federal courts are those essential to the exercise of conferred powers, and outside the reach of direct democratic control. They must, therefore, be exercised with extraordinary restraints. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).

The cases cited by appellant to support the inherent authority of a district court to award damages in this instance are not apposite. *Bell v. Hood*, 327 U.S. 678 (1946), and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) are cases in which an individual right was implicated, the Fourth Amendment guarantee against unreasonable searches and seizures. *See Bell*, 327 U.S. at 679; *Bivens*, 403 U.S. at 390-91. In addition, *Bell* implicated an individual right under the Fifth Amendment. 327 U.S. at

679. Here, the constitutional provision at issue is the Supremacy Clause, which creates no such individual constitutional right. *See White Mountain Apache*, 810 F.2d at 848. Accordingly, the inherent authority to grant relief in order to secure an individual right under the inherent authority of the federal courts may not be exercised here.

Section 1983 was intended to supplement remedies provided by the States. However, *McNeese v. Board of Education*, 373 U.S. 668, 671 (1966), *Alan v. McCurry*, 449 U.S. 90 (1980), and *Monroe v. Pape*, 365 U.S. 167 (1961), do not support the proposition, argued by Golden State, that inherent authority exists in the federal courts to award compensatory damages where section 1983 damages are unavailable. *Toll v. Moreno*, 458 U.S. 1 (1982), involved enforcement of a stay preserving issues for appeal; that case provides no guidance in resolving the inherent power question raised here. On the facts in this case, the district court correctly declined the exercise of "inherent powers" to award further damages.

CONCLUSION

Golden State is not entitled to further compensatory damages under 42 U.S.C. § 1983, either on the basis of the alleged NLRA violation or, alternatively, on the basis of the Supremacy Clause preemption. The inherent powers of the federal courts do otherwise allow an award of compensatory damages.

AFFIRMED.

ALARCON, Circuit Judge, concurring.

I concur in the majority's opinion under compulsion of our decision in *White Mountain Apache Tribe v. Williams* (*White Mountain*), 810 F.2d 844 (9th Cir.), *cert. denied*, 107 S. Ct. 940 (1987). In *White Mountain* we held that under Supreme Court precedent, 42 U.S.C. § 1983 "enforces federal statutory rights only against *direct* violations of the federal statute in question[,]" *id.* at 851 n.9 (emphasis added). Thus, the law of the circuit compels us to hold that section 1983 damages are not available because the City of Los Angeles did not directly violate the National Labor Relations Act (NLRA). I write separately on the issues discussed in Rubric II(A)(1), because I believe that *White Mountain* is inconsistent with the reasoning of the Supreme Court in *Wright v. Roanoke Redev. & Housing*, 107 S. Ct. 766 (1987).

I

Section 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the *deprivation of any rights, privileges, or immunities secured by the Constitution and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(Emphasis added). One month before the final decision in *White Mountain* was filed, the Supreme Court, in *Wright*, 107 S. Ct. at 771, said that under its prior rulings, "if there is a state deprivation of a 'right' secured

by a federal statute, § 1983 provides a remedial cause of action . . . ." We did not discuss *Wright* in our decision in *White Mountain*.

The Court in *Wright* did not hold that a state actor would be liable only if a federal statute expressly forbids the state actor from such interference. Instead, the Court focused on protecting the right secured by federal law, and not on whether all persons who might deprive another of the benefits of such a statute are identified by Congress. The language used by the Court in *Wright* carries out the plain meaning of the language of section 1983. Our opinion in *White Mountain* frustrates congressional intent.

29 U.S.C. § 158(d) (1982) provides that the obligation of the employer and the employees' representative is to bargain collectively "but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ." The provision allows free use of economic weapons by both parties to the collective bargaining process. *Golden State Transit Corp. v. City of Los Angeles* (*Golden State*), 475 U.S. 608, 615 (1986). The Supreme Court has interpreted section 158(d) as prohibiting the government from interfering in the collective bargaining process and interfering with the right to use economic weapons. *Id.* at 615-16.

In the case *sub judice*, the City of Los Angeles deprived Golden State of the statutory right to engage in the collective bargaining process free from third-party interference. 29 U.S.C. § 158(d); *Golden State*, 475 U.S. at 618. Thus, under *Wright*, Golden State would appear to have a cause of action for damages under section 1983. However, because third party interference is not expressly prohibited by the NLRA, the City did not directly violate the statute. Therefore, while the City interfered with Golden State's rights, *White Mountain* compels us to hold that section 1983 damages are not available because there was no direct violation of a statute by the City.

II

In its opinion, the majority discusses whether section 1983 damages would be available if the City directly violated the NLRA. Maj. op. at 11459-60. Because we find no direct violation of the NLRA as is required by *White Mountain*, it is not necessary to reach this question. Therefore, I do not join in that portion of the majority opinion and offer no opinion as to what ruling would be made if it were necessary to reach the issue.

I concur in the remainder of the opinion.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION ARTICLE VI, CLAUSE 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treatises made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

NATIONAL LABOR RELATIONS ACT, SECTION 8(d), AS AMENDED, 29 U.S.C. § 158(d)

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

THE CIVIL RIGHTS ACT OF 1871 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
DEC 16 1988
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CLERK

No. 88-840 (2)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

GOLDEN STATE TRANSIT CORP.,
Petitioner,

vs.

CITY OF LOS ANGELES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

When a City's action is preempted by virtue of the Supremacy Clause, can it be held liable pursuant to the Civil Rights Act, Section 1983, though there is no statutory violation?

PARTIES TO THE PROCEEDINGS BELOW

All Parties to the proceedings below subject to this petition for a writ of certiorari are set forth in the caption of the petition.

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No. 88-840

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

GOLDEN STATE TRANSIT CORP.,
Petitioner,

VS.

CITY OF LOS ANGELES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent City of Los Angeles respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case.

STATEMENT OF THE CASE

Golden State held a franchise to operate taxicabs in the City of Los Angeles pursuant to approval by the City Council under municipal law. Los Angeles Municipal Code, Section 71.02. Golden State's franchise was due to expire by its own terms, as provided in the franchise ordinance, on March 31, 1981. The City ordinance grant-

ing the franchise contained no provision for a renewal or extension. On February 11, 1981, Golden State's application for a new franchise to replace the expiring one was scheduled for consideration by the City Council. On the same date, the employee-drivers of Golden State, represented by the Teamster's Union, went on strike, an interim contract having expired at midnight, February 10. The City Council voted unanimously to postpone consideration of the granting of a four year renewal franchise. Golden State's franchise renewal came up again for consideration on March 23, 1981. During that time, Golden State had full legal authority to operate its taxicabs within the City, but did not hire strike replacements and thus had no taxicabs on the street. After public hearing and debate, the City Council voted 12-1 not to grant Golden State a new franchise. At the Council meeting of March 23, the representative for the Teamsters opposed the granting of the new franchise to Golden State replacing its expiring one. There was also discussion at the Council as to whether or not there was even a need for a renewal franchise for Golden State Transit in light of the fact that, despite the strike, the other taxicab operators were performing adequate service. The General Manager of the City's Department of Transportation, the City department which regulates taxicabs, testified that before the strike of Golden State's drivers there were too many taxicabs operating in the City. There was also testimony of independent drivers that with Golden State not operating they were, for the first time, making a decent minimal living and that the doormen of the major hotels had reported that they were getting a better quality of service with the non-operation of Golden State.

With the non-renewal of the franchise Golden State initiated litigation. The Federal District Court initially granted an injunction to allow Golden State to continue

to operate. This preliminary injunction was overturned on appeal, 686 F.2d 758 (9th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1982). Further court proceedings ensued with eventual review by the Supreme Court of a subsequent Ninth Circuit decision in this case, 754 F.2d 830 (9th Cir. 1985). The decision resulting from this review by this Court is attached as an Appendix to the Petition.

Though the testimony before the City Council preceeding the non-renewal of the franchise was varied, this Court, in *Golden State Transit v. City of Los Angeles*, 475 U.S. 608 (1986), stated that the District Court had found, at the time it granted the preliminary injunction, that the Council had conditioned the renewal franchise on a settlement of the labor dispute by March 31, and further stated that it agreed with the Court of Appeals, in its vacation of the preliminary injunction in the initial appellate decision (686 F.2d 758 [9th Cir. 1984]), that that finding was amply supported by the record. 475 U.S. at p. 615, Pet.App. p. 9a.[1]

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[1]It should be noted that what the Court of Appeals stated, in vacating the initial injunction granted to Golden State, was not that that finding was amply supported by the record but rather:

> "The district court found that 'the City's true purpose in declining to renew plaintiff's [Yellow Cab's] franchise' as 'substantively to influence the economic (as opposed to political) weapons of Yellow Cab and its Teamster drivers in their labor negotiation efforts, by diminishing the economic power of the drivers.' Courts, however, are not permitted to inquire into alleged motives of legislators. Rather, they must look to the effects of the legislative acts. (Cites.) The district court did determine that one *effect* of the denial of Yellow Cab's franchise renewal was to alter the balance of power in the collective bargaining dispute in favor of the union. (Cite.) That determination is not clearly erroneous. (Cite.) There is ample evidence in the record to support a finding that by threatening to deny and

This Court, in Footnote 6 of its Opinion, 475 U.S. at p. 615, Pet.App. p. 9a, also stated as an objective factor to support the purported finding that the renewal was subject to the condition of a settlement of the strike that the Council's agent, namely the Assistant City Attorney, had revealed that the condition was City policy.[2]

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ultimately denying renewal of Yellow Cab's franchise, the City deprived Yellow Cab of an economic weapon — the opportunity simply to outlast the strikers." 686 F.2d 758, 759 (9th Cir. 1982), cert. denied, 452 U.S. 1105 (1983) (emphasis in original.)

[2]The statement of the City Attorney, however, and the dialogue which preceded it was as follows:

BY JOHN HAGGERTY, ASSISTANT CITY ATTORNEY:

Yes. As and now the franchise dies March 31st.

BY MR. CUNNINGHAM (a City Councilman):

And if there is an action before March 31, the Council can respond? Right?

BY MR. JOHN HAGGERTY:

Well, the Council would have to make the necessary finding by this Friday at the latest for the extension to go until the end of April. For it to go beyond the end of April, a second ordinance or new ordinance would also have to be passed and published by the end of this month.

BY MR. CUNNINGHAM:

So you are saying on Friday the Council could take action, that would still give a timely activity to the extension of the franchise.

BY MR. JOHN HAGGERTY:

Well, yes. Council (sic) has to make the necessary findings by this Friday at the latest to extend the franchise to April 31. For the franchise to be extended beyond that an ordinance would also have to be passed and published by the end of (sic) this month.

Golden State, in its petition, asserts that the City did not present any evidence at the summary judgment proceeding in the District Court conducted on post-remand. To the contrary, evidence of the proceedings at the City Council, as hereinabove described, was presented to attempt to show that the evidence did not support a conclusion that the City Council conditioned the renewal of the franchise on a settlement of the strike.

Golden State, in Footnote 3 of the Pet., claims that at the time of the cease and desist order issued by the City to Golden State, Golden State was involved in an involuntary Chapter 11 reorganization initiated by one of its creditors. The cease and desist order, however, was issued on April 29, 1983. On that date, Golden State was in voluntary bankruptcy. Though a creditor had instituted an involuntary bankruptcy on February 18, 1981, Golden

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UNKNOWN:

Well, I think . . .

BY MR. CUNNINGHAM:

Has this been clearly stated to the parties at odds in this matter?

BY MR. HAGGERTY:

It has been clearly stated (sic) to those people who have contacted me and asked me, yes."

The finding referred to was a finding that it was in the best interest of the City to allow for such extension. The record shows that the Assistant City Attorney was responding to a question as to whether the parties had been informed that the Council had to make the necessary finding by Friday and that the ordinance had to be passed and published by the end of the month. Golden State, itself, had never claimed during the course of the litigation that the Assistant City Attorney made any statements telling petitioner the strike had to be settled for the franchise to be renewed.

State, on its own, converted it into a Chapter 11 proceeding on August 10, 1981. (LA-81-01812 JD.) On March 7, 1985, the proceeding was converted into a Chapter 7 liquidation.

POST REMAND PROCEEDINGS

Golden State, in Footnote 5 of the Petition, states that the injunctive relief granted on remand, after this Court's opinion, would be of no value since it long ago was forced to liquidate its business. Golden State claims that the cease and desist order issued by the City destroyed its business (p. 3 of the Petition). That order was issued on April 29, 1983. Yet counsel for Golden State, at the time of oral argument to this Court on December 4, 1985, stated, in response to the question of mootness,[3] that the company was ready to resume operations, even though it was in Chapter 11 bankruptcy. 475 U.S. at p. 613, ftn. 3; Pet.App. p. 6a.

DECISION BELOW

The Ninth Circuit opinion does not conflict with *Wright v. Roanoke Redev. and Housing* [479 U.S. 418] 107 S.Ct. 766 (1987).

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[3]The City had contended at the time the case was before this Court that the case was moot since the franchise, even if it had been renewed in March of 1981, would have expired March 31, 1985, the proposed term of the renewal franchise being four years.

REASONS FOR DENYING THE WRIT

I

REFUSAL TO GRANT DAMAGES DOES NOT NEGATE THIS COURT'S DECISION IN *GOLDEN STATE TRANSIT CORP. V. CITY OF LOS ANGELES.*

Golden State complains of the relief given by the district court, in this case, namely injunctive relief and ancillary relief based on the fair market value of Golden State's assets as of the date of the City's action, less any sum Golden State received pursuant to the bankruptcy proceedings. Golden State, argues that this relief is meaningless. But that assertion is not consistent with the position Golden State took before the Court in *Golden State* as reflected in Footnote 3 of 475 U.S. at p. 613, Pet.App. 6a. Rather, it is shown therein that counsel for Golden State, in response to the City's contention that the case was moot, said the company was ready to resume operations. The injunctive relief allows for such resumption of operations.

Golden State asserts that it is entitled to compensatory damages because every injury should have its proper redress. But that assertion is not the law. For example, this Court has recognized immunities of varying scope for different state and local officials sued under Section 1983. See cases cited, *Owen v. City of Independence, Mo.,* 445 U.S. 622, 637-638 (1980). There is also the Eleventh Amendment immunity afforded States in 1983 actions. And, as the Court stated in *Touche Ross & Co. v. Redington,* 442 U.S. 560, 568 (1979) "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person."

Golden State cites, in Footnote 8, in support of its claim for compensatory damages, the cases of *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics,* 403 U.S. 388 (1971) and *Bell v. Hood,* 327 U.S. 678 (1946). The Ninth Circuit decision below, in Part C, Pet. App. p. 27a, all three judges concurring, pointed out why those cases were not apposite; namely, that they involved individual rights guaranteed by the Fourth Amendment. The Constitutional provision involved here, however, as pointed out in the decision below, is the Supremacy Clause which creates no individual constitutional rights. Pet.App. p. 28a. *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600 (1979) held that a claim of preemption of state law by federal social security laws is not a claim within the jurisdictional requisites of 28 U.S.C. Section 1343(3). *Chapman,* therefore, stands for the proposition that the Supremacy Clause establishes federal-state priorities and does not create individual rights within the meaning of 28 U.S.C. Section 1343(3):

> "We must conclude that an allegation of incompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim, 'secured by the Constitution' within the meaning of Sec. 1343(3)." *Id.* at p. 615.

None of the cases cited by Golden State in Footnote 10 hold that a local government can be liable for damages when there is neither a violation of a Constitutional provision securing individual rights nor a violation of a federal statutory right.

II

THE RULING BELOW IS IN CONCERT WITH THIS COURT'S INTERPRETATION OF 42 U.S.C. SECTION 1983.

Maine v. Thiboutot, 448 U.S. 1, 4 (1980) held that Section 1983 was available to enforce violations of federal statutes. *Wright v. Roanoke Development and Housing Authority,* 479 U.S. 418, 107 S.Ct. 766, 770 (1987). Golden State claims that the Ninth Circuit attempted to fit this case into the exception to the *Thiboutot* rule created in *Pennhurst State School and Hospital v. Haldeman,* 451 U.S. 1 (1981). *Pennhurst* and *Middlesex County Sewage Authority v. National Sea Clammers, Assn.,* 453 U.S. 1 (1981) recognized two exceptions to the applications of Section 1983 to remedy statutory violations. *Wright,* 107 S.Ct. at p. 770. The first question, however, before there can be a consideration of whether either of the exceptions is applicable is did the City violate a federal statute. The decision below, rather than have to consider an exception, correctly concluded that the City did not violate the National Labor Relations Act, specifically Section 8(d), as amended, 29 U.S.C. Section 158(d). Pet.App. 24a. Golden State, therefore, failed to clear the first hurdle presented by the *Thiboutot-Pennhurst-Sea Clammers* line of cases.

Golden State, however, criticizes the Ninth Circuit in concluding there was no statutory violation for its "fixation upon the express language of the statute" (Pet., p. 17). Yet in any case involving the interpretation of a statute, the analysis must begin with the language of the statute itself. *Touche Ross & Co. v. Redington,* 442 U.S. 560, 568 (1979).

This Court, in ruling that the City's action had frustrated effective implementation of the NLRA processes (*Golden State,* at p. 615, Pet.App. 8a) and thus was preempted from conditioning Golden State's franchise renewal on the settlement of the labor dispute, focused on 8(d), as amended, 29 U.S.C. Section 158(d), 475 U.S. at p. 616; Pet.App. 90. Golden State is critical of the Ninth Circuit for discussing 8(d) in connection with 8(a) and 8(b) of the NLRA. (Pet., p. 16, ftn. 16). But 8(d) must be read in light of 8(a) and 8(b) insofar as these two latter subsections define an unfair labor practice, which includes the refusal to bargain collectively, 8(a)(5) as to an employer, and 8(b)(3) as to a labor organization. The language relied upon by this Court to find preemption in Golden State was the provision of 8(d) that states that the obligation to bargain collectively, and *thus not commit an unfair labor practice,* "does not compel either party to agree to a proposal or require the making of a concession."[4] 475 U.S. at p. 616; Pet.App. p. 9a. A violation of Section 8 is an unfair labor practice, which by the terms of the statute can only be committed by the employer or the employee labor organization. The City, as correctly

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[4]Section 8(d) provides (Section 8 is titled "Unfair Labor Practices"):

> (d) "*For the purposes of this section,* to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporated any agreement reached if requested by either party, but *such obligation,* does not compel either party to agree to a proposal or require the making of a concession; . . . ." (Emphasis added.)

pointed out in the decision below, being neither, could thus not violate Section 8, as amended, 29 U.S.C. Section 158 (Pet.App. 24a, 25a).

Judge Alarcon, though concurring with the decision, expressed reservations because of this Court's decision in *Wright v. Roanoke Redev. & Housing.*

In *Wright,* the applicable statute imposed a rent ceiling for rents charged to low-income people living in public housing projects. By the terms of the statute this created an obligation on anybody charging such rents upon such persons. The decision specifically stated, as to the rent limitation: "This was a mandatory limitation focusing on the individual family and its income." 93 L.Ed.2d 781, 792; 107 S.Ct. 766, 774(5). The mandatory provisions of Section 8 of the NLRA, on the other hand, apply specifically, and *only,* to the employer and employee labor organizations. Section 8 of the NLRA defines conduct which would constitute an unfair labor practice and 8(d), as amended, which was the basis of the *Machinist* rule of preemption being applied to the City's action (*Golden State,* 475 U.S. at p. 614, Pet.App. p. 7a), defines conduct of an employer which would not constitute an unfair labor practice, nothing more.

In addition, even if there had been, arguendo, a violation of Section 8 both the *Pennhurst* and *Sea Clammers'* exceptions would apply. The *Pennhurst* exception applies where the statute violated did not create enforceable rights, privileges or immunities within Section 1983. Section 8 defines the mutual obligations of employers, employees and employee labor organizations in their relationship with each other. Such being the case the statute, by its terms, did not impose any binding obligation upon the City. Thus the *Pennhurst* exception would be applicable. *Pennhurst,* 451 U.S. at pp. 27, 28.

The *Sea Clammers'* exception to the availability of a Section 1983 remedy, when Congress has foreclosed such an enforcement of the statute, would also be applicable assuming, arguendo, a violation of Section 8 since when an activity is arguably subject to Section 7 or Section 8 of the NLRA, the state and federal courts must defer to the exclusive competence of the NLRA. *San Diego Building Trades Council, etc. v. Garrison,* 359 U.S. 236, 245 (1959). Unfair labor practices are considered by the NLRB pursuant to Section 10 of the NLRA, 29 U.S.C. 160.

The decision below and *Wright* are clearly distinguishable on their facts, namely the nature of the language of the respective statutes. The Ninth Circuit result was correct and fair in holding that the City did not violate a statute, which by its terms, it could not violate.

III

SECTION 1983 RELIEF IS NOT APPROPRIATE IN PREEMPTION CASES.

Though three Justices may have wanted to hear *Private Truck Council of America, Inc. v. Quinn,* 476 U.S. 1129 (1986), a case involving the question of whether Section 1983 relief is appropriate in a Commerce Clause case because of conflicting lower court decisions[5] on that issue this case is not the appropriate vehicle to resolve that

[5]The conflict, referred to by the dissenting Justices, between *Consolidated Freightways Corp. v. Kassel,* 637 F.2d 1139 (8th Cir. 1984) and *Kennecott Corp. v. Smith,* 637 F.2d 181, 186 n.5 (5th Cir. 1980) is not substantial. The decision in *Kennecott,* contrary to the weight of authority, stated in a footnote, that the Commerce Clause can support an action under Section 1983. The decision, however, unlike the decision in *Consolidated Freightways,* did not undertake a substantial analysis of the issue.

conflict. The constitutional provision which is at issue in this case is the Supremacy Clause, not the Commerce Clause.

Golden State cites *Brown v. Hotel and Restaurant Employees and Bartenders Union Local 54,* 468 U.S. 491 (1984) (Pet., p. 21), a case involving "an actual conflict" with Section 7 of the NLRA. But *Brown* is not apposite since it involved "employee conduct" "protected by Section 7". The *Machinist* preemption doctrine, applicable in this case, on the other hand, specifically applies to conduct *not* protected nor prohibited under the NLRA. *Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 141 (1976).

Though the Supreme Court has never addressed the question whether the Supremacy Clause creates "rights, privileges or immunities" within the ambit of Section 1983 in *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 613-615 (1979), the Court did hold that the Supremacy Clause is not a substantive constitutional provision that creates rights within the meaning of 28 U.S.C. Section 1343(3).[6]

The Ninth Circuit Court decision in this case on the question as to whether Section 1983 relief is appropriate in a Supremacy Clause case is consistent with other opinions of that circuit dealing with the issue, namely *White Mountain Apache Tribe v. Williams,* 810 F.2d 844 (9th Cir. 1987), *cert. denied,* 107 S.Ct. 940 (1987) (claim of preemption of state motor carrier license and use fuel

[6]Section 1343(3) is the statutory provision conferring jurisdiction on federal district courts to hear actions commenced "(t)o redress the definition, under color of state law — of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress, providing for equal rights."

taxes by federal laws governing the harvest and sale of tribal timber does not come within Section 1983 so as to authorize Section 1988 (attorney fees); and *Segundo v. City of Rancho Mirage*, 813 F.2d 1387 (9th Cir. 1987) (claim of preemption of local rent control ordinances against Indian lands by federal laws does not come within Section 1983 so as to authorize 1988 attorney fees).

The Ninth Circuit Court of Appeals' decision is also consistent with all other circuits which have recently passed on this issue. The Seventh, Tenth and Eleventh Circuit Courts of Appeal have all decided that federal preemption claims do not come within the meaning of Section 1983. *Gould, Inc. v. Wisconsin,* 750 F.2d 608 (7th Cir. 1984), *affirmed on other grounds,* 475 U.S. 282 (1986) (claim of preemption of state labor laws by the Federal National Labor Relations Act does not come within Section 1983 so as to authorize Section 1988 attorney's fees); *J & J Anderson v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985) (claim of preemption of town ordinance by Federal Aviation Act does not come under Section 1983); *Pirolo v. City of Clearwater,* 711 F.2d 1006, *rehearing denied,* 720 F.2d 688 (11th Cir. 1983) (preemption of city ordinance by Federal Aviation Act does not come within Section 1983).

A number of district courts have come to the same conclusion. *Yakima Indian Nation v. Whiteside,* 617 F.Supp. 735 (E.D. Wash. 1985) affirmed in part on other grounds, 828 F.2d 529 (9th Cir. 1987) (federal preemption claim asserted by the Indian tribe does not come within the meaning of Section 1983); *Pesticide Public Policy Foundation v. Village of Wauconda,* 622 F.Supp. 423 (N.D. 511 1985), affirmed 826 F.2d 1068 (7th Cir. 1987) (alleged conflict between village ordinance and Federal Insecticide, Fungicide and Rodenticide Act does

not come within Section 1983); *United Nuclear Corp. v. Cannon,* 564 F.Supp. 581 (D.R.I. 1983) (preemption of state law by the Federal Atomic Energy Act does not fall within Section 1983); *New York Airlines, Inc. v. Dukes County,* 623 F.Supp. 1435 (D. Mass. 1985) (preemption of county ordinance by the Federal Aviation Act does not come within Section 1983); *Faux-Burhans v. County Com'rs of Frederick County,* 674 F.Supp. 1172 (D. Md. 1987) (preemption of County zoning ordinance by Federal Aviation Act would not come within Section 1983). The issue of whether Section 1983 relief is appropriate in a Supremacy Clause case has not produced conflicting results in the lower court.

CONCLUSION

The decision below is correct. It follows all controlling decisions of this Court. It is consistent with all other federal circuit and district court decisions on the issue of whether preemption claims under the Supremacy Clause come within the meaning of Section 1983. The petition for certiorari should be denied.

Respectfully submitted,

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Assistant City Attorney

By JOHN F. HAGGERTY,
Assistant City Attorney
Attorneys for Respondent

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 16, 1988, I served the within Brief in Opposition in re: "Golden State Transit Corporation vs. City of Los Angeles" in the United States Supreme Court, October term 1988, No. 88-840.

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Zachary D. Fasman
Paul Hastings, Janofsky & Walker
1050 Connecticut Avenue N.W.
Washington, DC 20036

All parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on December 16, 1988, at Los Angeles, California

CE CE MEDINA

REPLY

BRIEF

FILED
DEC 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-840

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

GOLDEN STATE TRANSIT CORP.,
Petitioner,

v.

CITY OF LOS ANGELES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I. SUPREME COURT REVIEW IS ESSENTIAL TO PRESERVE THE COLLECTIVE BARGAINING PROCESS AND PREVENT NEGATION OF THE COURT'S PRIOR DECISION.

1. The City's response has not met our basic claim: that the decision below effectively negates the Court's decision in *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986), and threatens the continued viability of the *Machinists* preemption doctrine. Unless the decision below is reversed, Golden State will have exercised its federally guaranteed right to bargain only at enormous cost. The City has not questioned and

cannot controvert our fundamental argument that the remedy sanctioned below is inadequate recompense for the losses suffered by Golden State at the hands of the City. Golden State has been prevented from operating for many years because of the City's unlawful conduct. The profits lost during those years, as well as the competitive damage caused by the lengthy hiatus in Golden State's operations, can be recompensed only through an award of compensatory damages.

2. Even more critically, there has been and can be no answer to our claim that the supposed inability of the federal courts to issue appropriate damage remedies to parties injured by unlawful municipal compulsion in bargaining effectively renders the Court's prior decision meaningless, and the *Machinists* doctrine of no practical significance. In *Golden State*, the most recent of the *Machinists* line of cases, the Court reiterated that Congress intended that management and labor would have the right to bargain free from improper government compulsion. One cannot bargain free from such compulsion if the price for the exercise of that freedom may be one's continuing livelihood. In a practical sense, there is no distinction between the right and the remedy in this situation.

3. This Court should not be misled into believing that what happened to Golden State is unique. We do not ask the Court to presume that municipal governments blithely will ignore the dictates of federal law spelled out in this Court's prior *Golden State* decision. It is a commonplace, however, that local political leaders frequently attempt to mediate bargaining disputes in which a strike may cause public inconvenience, and such mediation efforts readily can evolve into coercion inconsistent with the will of Congress.[1]

[1] Indeed, that is precisely what happened here. What is unique about this case is that the City, following unsuccessful mediation efforts by the Mayor and City Council, granted Golden State and the Teamsters a substantial period of time within which to settle their dispute, thus allowing Golden State to file suit prior to the falling of the municipal axe. There is nothing in the decisions below, or in this Court's prior opinion in *Golden State*, to prevent other governments from imposing a much shorter deadline upon the parties, completely precluding either employer or union from seeking the injunctive relief that is (according to the Ninth Circuit) the limit of judicial authority in this type of case.

4. The system of private industrial dispute settlement created by Congress cannot function properly unless management and labor freely can insist that government officials allow the parties to settle their own differences, at the bargaining table rather than in the political arena. In practice, the remedy issue is integral to whether there is a meaningful right to bargain at all, and thus this case necessarily involves the very same issue that this Court originally considered worthy of its attention in *Golden State*. If preserving the integrity of the bargaining process originally was important enough for the Court's consideration, this crucial remedial aspect of the controversy also requires the Court's attention.

II. REVIEW IS WARRANTED TO RESOLVE IMPORTANT ISSUES OF MUNICIPAL LIABILITY.

1. The decision below, and the City's defense of that decision, rests upon the premise that merely because a case involves "preemption", the federal courts are denied their traditional powers to grant full and effective relief. This proposition sacrifices responsible evaluation of the conduct in question for epithetical jurisprudence. In this case, the City legislated a lawful business out of existence because the owners exercised freedoms granted to them by Congress. No matter how that wrong is described in jurisprudential doctrine, its essential character—and the obvious violence this wrong does to the statutory scheme created by Congress—cannot be overlooked.

2. Granting a damage remedy against a municipality for such conduct is wholly in line with traditional fed-

eral court practice, as argued in our Petition (at 10-11). In contrast to the City's assertion, we never have contended that the Court should take this case to hold that every municipal wrong must sound in damages. We fully recognize that there are cases where no damage remedies are appropriate, and so stated in our Petition (at 10-11). What we argued in our Petition—and the City never has answered—is that this case does not fall within the class of cases where a damage remedy is foreclosed. No recognized jurisdictional concept deprives the federal courts of their full remedial powers in a case where a business has been punished merely because it exercised federally guaranteed rights, whether the case involves the Supremacy Clause or not.

3. As stated in our Petition, the Court never has considered whether Section 1983 relief is appropriate in preemption cases, although three Justices dissented from denial of certiorari in *Private Truck Council of America v. Quinn*, 476 U.S. 1129 (1986), a Commerce Clause case raising a related issue. This case presents an ideal opportunity for the Court to address the inter-relationship between the Supremacy Clause and Section 1983, and to explain why the federal courts must have authority under Section 1983 to protect individuals punished for the exercise of statutory rights affirmatively granted by Congress.

4. This recurrent and significant issue should be addressed by the Court, for reasons more fully developed in our Petition (at 18-22). Contrary to the City's argument, there is a substantial split in the circuits concerning whether a Supremacy or Commerce Clause claim sounds under Section 1983.[2] We called these cases to the

[2] The City contends that the Third Circuit case of *Kennecott Corp. v. Smith*, 637 F.2d 181 (3rd Cir. 1980), is insubstantial precedent for the proposition that Commerce Clause claims arise under Section 1983. Three Justices of this Court concluded to the contrary in the *Private Truck Council* case mentioned above. Moreover, the City also completely fails to discuss established law in the Sixth

Court's attention, however, not to suggest that a split in the circuits alone justifies the Court's consideration of this case, but to point out that the Section 1983 issue presented by the Petition is recurrent and has produced divergent results.

5. Lest the Court be misled by the City's characterization of our arguments, we reiterate that we never have contended that every Supremacy Clause claim (nor every Commerce Clause claim) necessarily sounds in damages or is cognizable under Section 1983. We agree with the Ninth Circuit's implicit holding that Section 1983 relief is available in preemption cases only where there is an actual and direct conflict between state or local action and federal law. In our Petition, we explicitly noted (at 20, n.21) that where the only Supremacy Clause claim is allegedly excessive state or local regulation in an area of pervasive federal interest, no Section 1983 claim arises. *Cf. Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979).

But this case does not involve state or local action in the face of federal inaction. Here, a lawful business was punished because of its stance in bargaining. The City thus attempted to set aside a deliberate affirmative decision by Congress to endow private parties with statutory rights. Such conduct plainly creates an actual and direct conflict with federal law. To hold that Section 1983 relief is unavailable here is to conclude that such relief is never available in any case in which the word "pre-emption" appears or the Supremacy Clause is in some way involved. It is this misapprehension of the fundamental

Circuit, represented by *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982), holding that both Supremacy Clause and Commerce Clause claims sound under Section 1983. *See ANR Pipeline Co. v. Michigan Public Service Commission*, 608 F.Supp. 43 (W.D. Mich. 1984) (applying circuit precedent and concluding that Supremacy and Commerce Clause claims sound under Section 1983).

principles of preemption law that calls for exercise of this Court's authority.

III. NO FACTUAL DISPUTES OR OTHER CONCERNS RENDER INAPPROPRIATE THE COURT'S IMMEDIATE CONSIDERATION OF THE ISSUES RAISED IN THE PETITION.

1. No factual disputes relevant to the issue raised in the Petition exist, despite the City's disingenuous suggestion that certiorari should be denied to allow further development of the record.[3] The issue raised in the Petition is purely one of law. The courts below did not reject an award of compensatory damages as factually inappropriate; they held such an award beyond their authority. This legal issue, properly certified below under 28 U.S.C. § 1292(b) as a controlling question of law whose immediate resolution will materially advance the ultimate termination of this litigation, is fully developed and completely presented by the current record.

2. Nothing will be gained by postponing resolution of this issue pending further proceedings in the lower courts. All that remains to be resolved below (if the Ninth

[3] As we noted in our Petition (at 5, n.4), the City introduced no evidence in post-remand proceedings, merely arguing about the conclusions to be drawn from the existing record. The record upon which summary judgment was granted for Golden State thus has not changed since this case previously was before the Court, and indeed is precisely the same record that has been analyzed again and again by the various courts that have considered this case. The City's claim that it did not condition franchise renewal upon settlement of the labor dispute not only directly contradicts its initial position in this litigation, *see Golden State Transit Corp. v. City of Los Angeles*, 520 F. Supp. 191, 193-94 (C.D. Cal. 1981), but has been made to and rejected by every court that has considered this case, including this Court. *See* 475 U.S., at 615, Pet. App., at 9a; 754 F.2d at 833 (9th Cir. 1985); 686 F.2d at 759 (9th Cir. 1982); 520 F. Supp. at 194 (C.D. Cal. 1981). Indeed, the City unsuccessfully raised these same factual arguments to this Court not only in its merits brief, but in its petition for rehearing.

Circuit decision is not reviewed) is determining the precise terms of an injunction and ascertaining the salvage value of Golden State's business in 1981. Completing these tasks will in no way address the years of lost profits suffered by Golden State as a result of the City's conduct. Neither will this remedy address the competitive damage inflicted upon the largest and oldest cab company in Los Angeles by a forced absence from the market for the last eight years. The matters that remain below are akin to ministerial acts, when compared to the issue of compensatory damages.[4] The issue is whether the Court, if it believes the question presented otherwise worthy of its consideration, will first require that the parties conclude further proceedings of no relevance to the crux of this case.

3. In addressing this question, we suggest that the Court should consider carefully the substantial and direct

[4] *Compare Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-80 (1975) (state court judgment considered final for purposes of Supreme Court review where federal issue is completely determined, despite pendency of further state court proceedings, and will survive and require decision regardless of the outcome of those proceedings); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (state court remand for ministerial purposes does not bar Supreme Court consideration of issue clearly and completely presented); *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945) (state court proceedings for an accounting do not bar High Court consideration of federal issue completely adjudicated). *And see Cox Broadcasting Corp. v. Cohn*, *supra*, 420 U.S., at 501, 504-05 (Rehnquist, J. dissenting) (concerns of finality are less pressing within the confines of the federal system than where premature review could disrupt coordinate state judicial system). This Court always has given considerations of finality a "practical rather than a technical construction", *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964), and this should especially be true where this Court's review is not statutorily limited to "final" judgments. *See* 28 U.S.C. § 1254(1) (allowing High Court review of court of appeals ruling "before or after rendition of judgment or decree"); *and see Mills v. Electric Auto-Lite Company*, 396 U.S. 375 (1970) (review granted on certified legal question although factual issues remained to be resolved).

threat to the bargaining process, discussed above and in our Petition (at 11-13), presented by the decision below. Unless and until the Ninth Circuit is reversed, neither management nor labor can afford to resist improper municipal pressures in bargaining, because neither can be assured that the federal courts will be able to rectify fully injuries that may be inflicted upon them.[8] The absence of a complete and effective remedy means that management and labor can be held hostage by municipal governments interested, for political reasons, in avoiding public inconvencience rather than in reaching a settlement that is the product of the parties' respective strength and free will. Congress created a system of private industrial dispute settlement in order to insulate the bargaining process from just such political pressures and concerns. We submit that the threat to this system created by the decision below is so substantial as to require the Court's immediate attention.

CONCLUSION

For the reasons stated above and in the Petition, a Writ of Certiorari should issue and the decision below should be reversed.

Respectfully submitted,

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[8] *See e.g., Goodyear Atomic Corp. v. Miller*, —— U.S. ——, 108 S.Ct. 1704 (1988) (immediate review of state decision necessary to prevent significant erosion of federal policies); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (same); *Local No. 438 Construction and General Laborers' Union v. Curry*, 371 U.S. 542 (1963) (applying same principle to labor field).

JOINT

APPENDIX

No. 88-840

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GOLDEN STATE TRANSIT CORPORATION,
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v.

CITY OF LOS ANGELES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 16, 1988
CERTIORARI GRANTED FEBRUARY 21, 1989

2260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-840

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NOTE: The appendix filed in the Petition for Certiorari contains the following material which is omitted from this Joint Appendix:

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 81-1519

GOLDEN STATE TRANSIT CORPORATION

v.

CITY OF LOS ANGELES

RELEVANT DOCKET ENTRIES

1. Complaint filed March 30, 1981.

2. Declaration of John Rice in Support of Application for Temporary Restraining Order, with Exhibits, filed March 30, 1981.

3. Declaration of Eugene Maday in Support of Application for Temporary Restraining Order, with Exhibits, filed March 30, 1981.

4. Temporary Restraining Order, with supporting findings of fact and conclusions of law, entered following hearing, March 30, 1981.

5. Preliminary Injunction with supporting findings of fact and conclusions of law, entered following hearing, on April 13, 1981.

6. Defendant's Answer to Complaint, filed April 20, 1981.

7. Defendant's Notice of Appeal of Preliminary Injunction, filed April 29, 1981.

8. Entry of written opinion of Judge A. Hauk, granting preliminary injunction (reported at 520 F. Supp. 191 (C.D. Cal. 1981)), entered August 18, 1981.

9. Second Amended Complaint, raising antitrust claims, filed March 28, 1983.

10. Request for Judicial Notice, dated April 7, 1983, with Exhibit.

11. Defendant's Answer to Second Amended Complaint, filed April 15, 1983.

12. Entry of Order granting Partial Summary Judgment on antitrust claims, with supporting findings of fact and conclusions of law (reported at 563 F. Supp. 169 (C.D. Cal. 1983)), entered May 3, 1983.

13. Plaintiff's Notice of Appeal from Partial Summary Judgment, filed May 16, 1983.

14. Entry of Order granting Partial Summary Judgment on all other claims, with supporting findings of fact and conclusions of law, entered October 21, 1983.

15. Plaintiff's Notice of Appeal of Order granting Partial Summary Judgment on all remaining issues, filed November 16, 1983.

16. Entry of order granting Plaintiff summary judgment on liability, without decision as to appropriate remedy, entered September 15, 1986.

17. Entry of decision and order granting injunctive relief, denying compensatory relief, certifying said decision and order for immediate appeal under 28 U.S.C. § 1292(b), and staying all further proceedings pending appellate review, entered April 27, 1987.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5369
No. 83-5903
No. 83-6441
No. 87-6074

GOLDEN STATE TRANSIT CORPORATION

v.

CITY OF LOS ANGELES

RELEVANT DOCKET ENTRIES

1. Decision of United States Court of Appeals for the Ninth Circuit, vacating preliminary injunction (reported at 686 F.2d 758 (9th Cir. 1982)), entered September 7, 1982. (No. 81-5369)

2. Denial of Petition for a Writ of Certiorari by the United States Supreme Court (reported at 459 U.S. 1105 (1983)), entered January 10, 1983. (No. 81-5369)

3. Decision of United States Court of Appeals for the Ninth Circuit, upholding district court grant of summary judgment on antitrust claims (reported at 726 F.2d 1430 (9th Cir. 1984)), entered February 28, 1984. (No. 83-5903)

4. Decision of United States Court of Appeals for the Ninth Circuit, denying Petition for Rehearing and Suggestion for Rehearing En Banc, entered May 14, 1984. (No. 83-5903)

5. Plaintiff's Petition for a Writ of Certiorari on antitrust issues, filed September 10, 1984 (Supreme Court No. 84-378). (No. 83-5903)

6. Decision of United States Court of Appeals for the Ninth Circuit, upholding district court grant of summary judgment on labor and other constitutional issues (reported at 754 F.2d 830 (9th Cir. 1985)), entered February 26, 1985. (No. 83-6441)

7. Denial of Petition for a Writ of Certiorari on antitrust issues entered by United States Supreme Court (reported at 471 U.S. 1003), on April 1, 1985. (No. 83-5903)

8. Plaintiff's Petition for a Writ of Certiorari on labor preemption issues, filed April 19, 1985 (Supreme Court No. 84-1644). (No. 83-6441)

9. Order of United States Supreme Court, granting Plaintiff's Petition for a Writ of Certiorari (reported at 472 U.S. 1016), entered June 17, 1985. (No. 83-6441)

10. Decision of United States Supreme Court (reported at 475 U.S. 608 (1986)), entered April 1, 1986. (Supreme Court No. 84-1644)

11. Denial of Defendant's Petition for Rehearing En Banc by United States Supreme Court, entered May 2, 1986. (Supreme Court No. 84-1644)

12. Order of the United States Court of Appeals for the Ninth Circuit remanding the litigation to the United States District Court for the Central District of California (reported at 791 F.2d 1383 (9th Cir. 1986)), entered June 16, 1986.

13. Order of United States Court of Appeals for the Ninth Circuit granting Plaintiff's Petition for Permission to Appeal, entered June 27, 1987.

14. Decision of United States Court of Appeals for the Ninth Circuit, affirming district court decision and order on remedies (reported at 857 F.2d 631 (9th Cir. 1988)), entered September 15, 1988. (No. 87-6074)

15. Plaintiff's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, filed November 16, 1988. (Supreme Court No. 88-840)

16. Order of United States Supreme Court, granting Plaintiff's Petition for a Writ of Certiorari (reported at 57 U.S.L.W. 3534 (1989)), entered February 21, 1989. (Supreme Court No. 88-840)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 81 1519 AAH (Gx)

GOLDEN STATE TRANSIT CORPORATION,
a California corporation, doing business as
Yellow Cab of Los Angeles,
Plaintiff,

v.

CITY OF LOS ANGELES, a municipal corporation,
Defendant.

COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTION, DECLARATORY RELIEF AND MONEY DAMAGES

Plaintiff, for its Complaint, states as follows:

JURISDICTION

1. This Court has jurisdiction of the first count of this action under 28 U.S.C. § 1331 in that it arises under the Constitution of the United States, Article VI, § 1, under the National Labor Relations Act, 29 U.S.C. §§ 151-68 et seq., under the Labor Management Relations Act, 29 U.S.C. §§ 141-67, 171-97. The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.

2. This Court has jurisdiction of the second count of this action under 28 U.S.C. §§ 1331 and 1343 in that it arises under the Constitution of the United States, under the Civil Rights Act, 42 U.S.C. §§ 1983, 1985, 1986, and

28 U.S.C. § 2201, and the amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.

PARTIES

3. Plaintiff GOLDEN STATE TRANSIT CORPORATION, doing business as Yellow Cab of Los Angeles is a corporation organized and existing under and by virtue of the laws of the State of California, and doing business in and with its principal office in the City and County of Los Angeles. Plaintiff is the grantee of a Los Angeles City Franchise which permits it to operate a taxicab service in the city of Los Angeles.

4. Defendant City of Los Angeles is a chartered city organized and existing under the Constitution and laws of the State of California.

FACTS

5. In or about 1977, plaintiff's predecessor was affiliated with the Westgate-California group of companies and was in bankruptcy. The bankruptcy receiver was seeking a purchaser for the bankrupt's assets, including the Los Angeles City taxi franchise. At that time, the bankrupt was not operating pursuant to its franchise but did have a union contract. The bankrupt's drivers were organized through Teamster's Local No. 572 and represented by Joint Council of Teamsters No. 42.

6. On May 17, 1977, plaintiff paid the receiver approximately $550,000 for the assets, including the right to use the name "Yellow Cab of Los Angeles" and, subject to City Council approval, all rights under the existing franchise. Plaintiff was assured that getting the franchise renewed had always been automatic and that no Los Angeles taxicab franchise had failed to be renewed. Based upon that representation, plaintiff purchased said franchise and assets; since that time, plaintiff has caused over two million dollars to be invested in the operation of the franchise.

7. Upon obtaining the franchise, plaintiff operated pursuant to a collective bargaining agreement with its Teamster drivers. The agreement expired in October, 1980. Plaintiff continued to operate pursuant to interim agreements with the Teamsters, but the parties continue to dispute regarding wages and benefits. This dispute has been and is subject to mediation by the Federal Mediation and Reconciliation Services. Plaintiff has been and continues to act in good faith to resolve the dispute. On February 11, 1981, plaintiff's drivers went on and remain on strike.

8. On March 31, 1980, plaintiff applied in a timely manner for renewal of its taxicab franchise, said renewal to take effect upon expiration of the existing franchise. The defendant's Department of Transportation stated in its report to the Board of Transportation Commissioners that plaintiff was in full compliance with all terms and conditions of its franchise.

9. Defendant's power to grant a taxicab franchise flows from the Los Angeles City Charter, § 3 Subdivision 8, Los Angeles Municipal Code § 71.12(b) and Los Angeles Administrative Code Division 13, Chapter 1, Articles 2 through 13, inclusive.

10. The specific procedure for granting and renewal of any franchise is established under ¶ A and ¶ D of Subdivision 8 of § 3 of the Los Angeles City Charter which provide in part that:

> (a) "The Council shall adopt an ordinance which shall establish the procedure . . . for granting a new franchise [to the holder of an existing franchise] for a period not exceeding ten years, to replace a franchise about to expire as authorized in Paragraph D of this subdivision . . ."
>
> (b) "The City may, by ordinance, adopted five years or less prior to the expiration of any franchise, grant to the holder of such franchise a new franchise to replace such franchise about to expire, such new franchise to run for a period not to exceed ten years from the date of expiration of the franchise it replaces. All such franchises so granted shall be in accordance with the procedure ordinance at the time in force, and shall carry all the conditions required in the original franchise. . ."

11. By Ordinance Number 149,825, effective July 17, 1977, the Los Angeles City Council enacted an ordinance granting a taxicab service franchise to plaintiff, more particularly entitled, "An ordinance consenting to the assignment by Yellow Cab Company of California of the franchise [to Los Angeles Yellow Cab] granted by ordinance and amendments herein prescribed." Under the terms of said ordinance, plaintiff's franchise was to expire on October 29, 1980. By Ordinance Numbers 154,409 and 154,713, the above ordinance was amended to extend the expiration period until March 31, 1981. Said franchise is now in full force and effect, but will terminate at midnight on March 31, 1981 as a result of defendant's actions as described more particularly herein.

12. Approval of plaintiff's franchise was recommended by the Board of Transportation Commissioners in its report to the Transportation and Traffic Committee of the City Council on September 4, 1980 and again on January 26, 1981. On November 19, 1980, the Transportation and Traffic Committee recommended to the full City Council that a five year renewal franchise be granted to plaintiff.

13. Of the other thirteen taxicab franchises within the City of Los Angeles, plaintiff was among the six recommended by the Department of Transportation for five year renewal; the six of the remaining seven franchises were recommended for approval for one year; one franchise was not recommended for approval.

14. The ordinance approving plaintiff's franchise as well as ordinances approving the other thirteen fran-

chises (including the franchise which had been disapproved by the Department of Transportation), were placed on the City Council calendar for February 11, 1981.

15. Plaintiff and the Teamsters have been unable to agree to a long-term labor contract. A short-term agreement was scheduled to and did expire at midnight February 10, 1981 on the eve of scheduled Council action.

16. On February 5, 1981, by letter to the Mayor and all Council members, the joint council of Teamsters informed the City Council that a labor dispute existed between plaintiff and the Teamsters; on information and belief, plaintiff alleges that a request was made by the teamsters to postpone the granting of a renewal franchise until a labor contract between the plaintiff and the teamsters was signed. In response to this request, the City Council declined to renew plaintiff's franchise on February 11, 1981, postponing consideration until February 17, 1981. All of the other franchises scheduled for granting were renewed on February 11, 1981.

17. Also, on February 11, 1981, the City Council adopted the Committee report and ordinance granting multi-year franchises to five of the enumerated companies. Plaintiff was deleted from the list of companies, and the ordinance pertaining to its multi-year franchise was continued for consideration to February 17, 1981. The Committee report stated that all six companies including plaintiff were in full compliance with all terms and conditions of the franchise. The Committee report was adopted.

18. On February 17, 1981 the City Council considered the question of the franchise for plaintiff. The multi-year ordinance which had been continued from February 11, 1981 was not presented to the City Council at that time. Instead, a substitute ordinance was presented which provided for an extension of the Golden State franchise

to April 30, 1981, provided, among other things, that the City Council was to find on or before March 27, 1981, that the 30-day extension ordinance was in the best interests of the City. This 30-day extension ordinance was supported by the Joint Council of Teamsters and the County Federation of Labor. The City Council minutes reflect that the spokesman for the Joint Council of Teamsters cited labor difficulties as the reason why it was necessary for such a short extension instead of a multi-year franchise.

19. On March 23, 1981, the City Council considered a motion made by the chairperson of the Transportation and Traffic Committee that the City Council adopt a finding that the 30-day extension of the plaintiff franchise was in the best interests of the City. At that time the extension was opposed by the Joint Council of Teamsters. The City Council declined to adopt the necessary finding, thereby preventing the 30-day extension ordinance from going into effect. The legal effect of the failure of the Council to adopt the finding is that the franchise of plaintiff will now expire on March 31, 1981. During the Council debate on the Motion, various Council members expressed the opinion that if plaintiff were to resolve its labor difficulties with the Teamsters, the finding would be made in time for the ordinance to take effect.

20. The Teamsters were determined to use the franchise extension proceedings as a lever to force Yellow Cab to accede to their demands; on March 22, 1981, Hugo Morris, the Teamster representative, stated to plaintiff, "We are going to see that your franchise is revoked or not renewed if you do not meet our demands." On March 23, 1981 Mr. Morris appeared before the City Council and urged the council not to renew or grant an extension of plaintiff's franchise.

21. The refusal of the City to grant plaintiff a four-year franchise when five other operators obtained fran-

chises under similar circumstances was arbitrary and capricious, was based solely upon political considerations and was designed to force plaintiff to accede to the union demands.

22. At no point in the franchise renewal proceedings was plaintiff notified that any evidentiary or fact-finding hearing would be held to determine whether the franchise should be renewed. Plaintiff was never offered an opportunity to present sworn testimony, to offer admissible evidence, or to cross-examine opposing parties under oath. The only factual findings adduced were that plaintiff was in full compliance with all the terms of its franchise.

FIRST CAUSE OF ACTION

(Violation of Supremacy Clause of the United States Constitution by Conflicting with the National Labor Relations Act, the Labor Management Relations Act—Declaratory and Injunctive Relief)

23. Plaintiff realleges paragraphs 1 through 22 hereof and incorporate the same herein as though set forth at length.

24. The foregoing action by defendant constitutes a violation of the Supremacy Clause, Article VI, § 1 of the United States Constitution by conflicting with the National Labor Relations Act, 29 U.S.C. §§ 158-68 et seq., and the Labor Management Relations Act, 29 U.S.C. §§ 141-67, 179-97, in that it is a wrongful and a discriminatory interference by defendant with the collective bargaining process between plaintiff and the Teamsters, by threatening to destroy plaintiff's business unless plaintiff accedes to union demands.

25. An actual controversy exists between plaintiff and defendant as to whether or not said action is in conflict with Federal law and whether or not said action violates the Supremacy Clause of the United States Constitution.

Plaintiff contends that the said action is unconstitutional. Defendant contends that the action is constitutional.

26. Plaintiff desires a declaration of its rights with respect to the constitutionality of said action and asks the Court to make a declaration of such rights, duties, and responsibilities, and to make a declaration as to the validity and constitutionality of said action. Such a declaration is necessary and appropriate at this time in order that plaintiff may proceed under the law. There are no administrative remedies available to plaintiffs that will guard against enforcement of said actions.

27. The illegal actions of defendant City of Los Angeles threaten to cause plaintiff irreparable injury, to wit, loss of franchise rights, destruction of ability to bargain or contract with the union drivers, loss of customers to competition, loss of over two million dollars invested in plaintiff's business. Plaintiff's franchise will terminate on March 31, 1981 unless defendant is enjoined from failing to take action to renew and/or extend said franchise. Once said franchise has terminated, the defendant city contends that it cannot be reinstated without a lengthy hearing on need and necessity as well as a competitive bidding scheme pursuant to defendant's municipal laws. There exists no adequate remedy at law or otherwise to protect plaintiff from the threatened irreparable injury.

28. Plaintiffs will suffer irreparable injury unless the injunctive relief prayed for is granted.

SECOND CAUSE OF ACTION

(Cause of Action for Damages for Violation of Civil Rights)

29. Plaintiff realleges paragraphs 1 through 28 hereof and incorporate the same herein as though set forth at length.

30. At all times herein mentioned Defendant was acting or pretending to act under color of one or more statutes, regulations, ordinances, customs or usages of the State of California and the City of Los Angeles, and was carrying out the official policy, custom and practice of the City of Los Angeles.

31. Because of the above recited acts, plaintiff was subjected to the deprivation by Defendant City under color of law and of statutes, ordinances, regulations, customs and usages of the State of California and City of Los Angeles, of rights, privileges, and immunities secured to it by the Constitution and laws of the United States and particularly its right not to be deprived of property without due process of law to wit, the following property rights: its justifiable expectation of franchise renewal, its franchise, its ability to freely bargain with the union, and its business.

32. Because of the above recited acts, plaintiff was subjected to the deprivation by Defendant City under color of law and of statutes, ordinances, regulations, customs and usages of the State of California and City of Los Angeles, of rights, privileges, and immunities secured to it by the Constitution and laws of the United States and particularly its right to equal protection of the law in that other franchises were renewed and were granted to entities similarly situated with plaintiff, but defendant arbitrarily and capriciously refused to renew plaintiff's franchise. As a direct and proximate result of the foregoing, plaintiff was and will be damaged in its business in the sum of $10,000,000.

33. Plaintiffs have no adequate remedy at law since once its franchise is terminated, plaintiff will be faced with the loss of franchise rights, destruction of ability to bargain or contract with the union drivers, loss of customers to competition, loss of over two million dollars invested in plaintiff's business. Plaintiff's franchise will terminate on March 31, 1981 unless defendant is enjoined

from failing to take action to renew and/or extend said franchise. Once said franchise has terminated, the defendant city contends that it cannot be reinstated without a lengthy hearing on need and necessity as well as a competitive bidding scheme pursuant to defendant's municipal laws.

34. Defendant herein acted wilfully, maliciously, intentionally, oppressively and in reckless disregard of the possible results of its conduct, and accordingly, Plaintiff is entitled to punitive and exemplary damages for the sake of example and by way of punishing Defendant in the amount of $1,000,000.

THIRD CAUSE OF ACTION

(For Temporary Restraining Order
Preliminary and Permanent Injunction
Against Defendant City)

35. Plaintiff realleges paragraphs 1 through 34 hereof and incorporate the same herein as though set forth at length.

36. As recited above, defendant City is illegally threatening to deprive Plaintiff under color of law and of statutes, ordinances, regulations, customs and usages of the State of California and City of Los Angeles of:

a. Its right not to be deprived of property without due process of law;

b. Its right, to equal protection of the law, all as guaranteed and secured to it by the Constitution and laws of the United States; and

c. Its right to engage in collective bargaining with its employees without local political interference.

37. The illegal actions of Defendant City have threatened to and will have caused Plaintiff irreparable injury, as alleged herein.

38. Unless this Court grants the relief requested, there exists no other adequate remedy at law or otherwise to protect Plaintiff from the threatened irreparable injury.

39. No injury could result to the City of Los Angeles through the Court's restraining and enjoining the illegal actions as described herein.

FOURTH CAUSE OF ACTION

(Declaratory Relief)

40. Plaintiff realleges paragraphs 1 through 39 hereof and incorporate the same herein as though set forth at length.

41. This is a claim for declaratory judgment pursuant to 28 U.S.C. §§ 2201 for the purpose of determining an actual, justifiable controversy that exists between Plaintiff and Defendant City of Los Angeles as appears hereinafter.

42. Plaintiff claims and Defendant City of Los Angeles, upon information and belief, denies that the aforedescribed action of the city under color of law violates the following constitutional rights of plaintiff:

a. Its right not to be deprived of property without due process of law;

b. Its right, to equal protection of the law, all as guaranteed and secured to it by the Constitution and laws of the United States; and

c. Its right to engage in collective bargaining with its employees without local political interference.

43. Plaintiff is entitled to a speedy hearing of this cause of action and is entitled to have it advanced on a calendar for hearing.

WHEREFORE, Plaintiff prays for relief from Defendants as follows:

1. That Defendant City of Los Angeles and its officers, agents, representatives and employees be temporarily restrained and enjoined pendente lite and permanently from refusing to renew plaintiff's franchise and from further interference with the collective bargaining activities between plaintiff and its employees.

2. For a declaratory judgment as follows: a declaration of the respective rights, duties and responsibilities of plaintiff and defendant, and a declaration and judgment that that the conduct of defendant as alleged herein is a *per se* violation of the following constitutional and statutory rights of plaintiff:

a. Its right not to be deprived of property without due process of law;

b. Its right, to equal protection of the law, all as guaranteed and secured to it by the Constitution and laws of the United States; and

c. Its right to engage in collective bargaining with its employees without local political interference.

3. The sum of Ten Million Dollars ($10,000,000) in general damages.

4. The sum of Ten Million Dollars ($10,000,000) in punitive and exemplary damages.

5. Costs of suit and reasonable attorneys fees.

6. For such other and further relief as the Court deems just and proper.

DATED: March 30, 1981.

/s/ Michael R. Mitchell
MICHAEL R. MITCHELL

/s/ John B. Rice
JOHN B. RICE
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff herein demands trial by jury of all issues of fact properly triable thereby.

/s/ Michael R. Mitchell
MICHAEL R. MITCHELL

/s/ John B. Rice
JOHN B. RICE
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 81-1519 AAH (Gx)

GOLDEN STATE TRANSIT CORPORATION,
a California corporation, doing business as
Yellow Cab of Los Angeles,
Plaintiff,

vs.

CITY OF LOS ANGELES, a municipal corporation
Defendant.

DECLARATION OF JOHN RICE IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING

1. I am an attorney at law, licensed to practice law in this court and in the courts of the State of California. I maintain offices at 5850 Canoga Avenue, 4th Floor, Woodland Mills, CA 91367.

2. If called as a witness, I would competently testify under oath to the facts set forth herein based on my personal knowledge.

3. On Thursday, March 26, 1981, I appeared at the Offices of the City Clerk of the City of Los Angeles located on the Third Floor of City Hall, Los Angeles.

4. In accordance with the California Public Records Act, (See 6250, *et seq.* California Government Code) I requested permission to inspect and obtain copies of documents contained in Official City Council file No. 80-1485, pertaining to the application of Golden State Transit Corporation, d/b/a Yellow Cab for a renewal of its taxicab franchise.

5. My request was granted and after inspecting the file, I requested copies of the several documents.

6. On Friday, March 27, 1981, I obtained the requested copies of documents from the Office of the City Clerk. True and correct copies of the documents marked Exhibits 1 through 11 are attached hereto and incorporated herein by reference.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on the 30th day of March, 1981 at Woodland Mills, CA.

/s/ John B. Rice
JOHN B. RICE

EXHIBIT 1

APPLICATION FOR FRANCHISE RENEWAL

CITY COUNCIL
CITY OF LOS ANGELES
Room 395, CITY HALL
200 North Spring Street
Los Angeles, California 90012

DATE: Mar. 31, 1980

Golden State Transit, Inc. hereby requests a renewal of its taxicab franchise(s) granted by Ordinance(s) No. 149,825 and 146,496 which expire on October 29, 1980.

The $200 application fee (certified check No. 04178), made payable to the City Treasurer, is enclosed as required by franchise procedure Ordinance No. 58,200.

/s/ Richard M. Burlingame,
Vice President
Golden State Transit Corp.

Enclosure

The Clerk reported that Certified Check No. 04178 of said Golden State Transit Corporation, drawn on the Community Bank, Hunting Park Office, in the sum of $200, accompanied said application.

In accordance with the provisions of Sections 13.4-13.50 of the Los Angeles Administrative Code, the President, on behalf of the Council, ordered said application referred to the Board of Transportation Commissioners for report.

EXHIBIT 2

REPORT
DEPARTMENT OF TRANSPORTATION

E18
August 26, 1980

To: Board of Transportation Commissioners
Wednesday, September 8, 1980

REFERENCE: Council Files 80-1717, 80-2070, 80-1643, 80-1485, 80-1709, 80-1642, 80-1358, 77-1167, 80-1608, 80-1356, 80-1787, 80-2101, 80-1246, 80-1365

SUBJECTS TWO MONTH RENEWAL OF EXISTING TAXICAB FRANCHISES

RECOMMENDATION

That your Board recommend to the City Council that all existing taxicab franchises, which all expire on October 29, 1980, be renewed to December 31, 1980 with no changes in the terms and conditions.

Company	Ordinance No.	Council File No.
Monarch Transportation, Inc.	149,002	80-1717
Southern California Transit Co.	146,498	80-2070
Lupe, Inc.	153,951	80-1643
Golden State Transit Corp.	149,825	80-1485
The F. Michael Crawford Corp.	151,680	80-1709
Celebrity Private Car Service	149,429	80-1642
A & W Cab Company, Inc.	153,851	80-1358
High Land Transit Co.	149,802	77-1167
		80-1608
Red and White Cab Co.	146,499	80-1356
Yellow Cab Co. of Culver City, Inc.	151,570	80-1787
James D. Mitchell	153,331	80-2101
Wilmington Cab Co.	146,501	80-1246
	149,699	
Los Angeles City Cab Co., Inc.	149,803	80-1365

That your Board request the Council to consider this action a "temporary" extension on the applicants' original request for renewal with final action by Council and Mayor to be completed prior to November 26, 1980.

DISCUSSION

The Comprehensive Taxicab Study, as approved by the Board on September 3, 1980, recommends extensive upgrading of franchise terms and conditions as the franchises are renewed.

The ordinances must be drawn up, approved and published by September 29, 1980, to become effective by the October 29, 1980 expiration date.

It appears that there may not be sufficient time for Council to meet this deadline. It will be necessary for the Board to recommend to the Council that the existing franchise be renewed for a limited period. A two month extension is recommended. A proposed draft of ordinance is attached.

This will afford the Committee and the full Council ample time to adequately review and act on the Board recommendations. The (renewal) ordinance must be published for 30 days and become effective before December 31, 1980.

Submitted

/s/ Neil B. Clark
NEIL B. CLARK
Principal Transportation Engineer

Approved

/s/ Donald R. Howery
DONALD R. HOWERY
General Manager

JR:db

Attachment

[Approved September 3, 1980
Board of Transportation Commissioners]

EXHIBIT 3

CITY OF LOS ANGELES
INTER-DEPARTMENTAL CORRESPONDENCE

Date: September 4, 1980

To: Transportation and Traffic Committee
c/o City Clerk's Office, 395 City Hall

From: Board of Transportation Commissioners,
1200 City Hall

Subject: RENEWAL OF EXISTING TAXICAB FRANCHISES
Council Files 80-1717, 80-2070, 80-1643, 80-1485, 80-1709, 80-1642, 80-1358, 77-1167, 80-1608, 80-1356, 80-1787, 80-2101, 80-1246, 80-1365

The franchises of all thirteen (13) existing taxicab companies in the City of Los Angeles expire on October 29, 1980. Each company submitted an application for franchise renewal to the City Council whereupon it was referred to the Board of Transportation Commissioners for report.

At a special meeting held on September 3, 1980, the Board approved the following recommendations on this matter for Council action:

1. That a 5 year replacement taxicab franchise, that will expire on October 29, 1985, in accordance with the attached franchise be granted to:

   LUPE, INC.
   GOLDEN STATE TRANSIT CO.
   CELEBRITY PRIVATE CAR SERVICE
   RED AND WHITE CAB CO.
   WILMINGTON CAB COMPANY

2. That a four month probationary franchise with a provision for extension to five years upon affirmative

finding of compliance by the Board, in accordance with the attached franchise, be granted to each of the following:

Companies	* Conditions of Probation
Monarch Transportation, Inc.	A
The F. Michael Crawford Corp.	BC
A & W Cab Co.	BC
High Land Transit Co.	ABC E
Yellow Cab Company of Culver City, Inc.	BC
James D. Mitchell	ABCD
Southern California Transit Co.	D

*A) Payment of franchise fees.

B) Compliance with all rules regarding leasing/contracting operations.

C) Furnish waybills and dispatch records.

D) Maintain minimum number of vehicles required by franchise.

E) Compliance with Affirmative Action requirements of franchise.

3. That the application of Los Angeles City Cab Company, Inc., for a replacement franchise be denied.

4. That any change in ownership of the grantee shall be subject to Council approval.

5. That the Council amend Section 71.05(b) of the Los Angeles Muncipal Code to provide for an increase in vehicle permit fees for taxicabs and that the revised Section read substantially in accordance with the accompanying draft.

The Board also approved a recommendation to "temporarily" extend all existing franchise for two months. This discretionary action is more fully detailed on the attached approved Board report of September 3, 1980. A

proposed draft of ordinance for each extension accompanies the report.

/s/ Carmen Alva
CARMEN ALVA
Secretary

JR:db

Attachments

cc: All franchised operators

EXHIBIT 4

RECOMMENDATION OF CITY COUNCIL TRANSPORTATION AND TRAFFIC COMMITTEE

COMMUNICATION

To: The Council

From: Pat Russell, Chairwoman
Transportation and
Traffic Committee

80-4592	80-1485	77-1167	80-2101
80-1717	80-1709	80-1608	80-1246
80-2070	80-1642	80-1356	80-1365
80-1643	80-1358	80-1787	

RECOMMENDATION

In order to provide for a further temporary extension of all 13 existing taxicab franchises due to expire on 12-31-80, as there is insufficient time to properly evaluate the Board of Transportation recommendations adopted on 9-3-80, and its "Staff Taxi Industry Study" and the Los Angeles County Interim Taxicab Industry Report, and to conduct a public hearing including receiving comments from the taxi industry, the Chairwoman of your Committee RECOMMENDS (the other two members being absent from the meeting at which this matter was considered, notwithstanding the recommendation of the Board of Transportation on 9-3-80 for a temporary extension only to 12-31-80 and its lack of quorum on November 13, 1980 to consider a three-month extension to 3-31-81, as follows:

1. That the folowing accompanying 13 ordinances which will "temporarily" extend all of the following 13 existing taxicab franchises from 12-31-80 to 3-31-81, with no changes in terms and conditions, approved as to form and legality by the City

Attorney, BE PLACED UPON THEIR PASSAGE AND TRANSMITTED FORTHWITH TO THE MAYOR:

Company	(Original Or As Assigned) Franchise Ordinance No.	Area	Council File No.
Monarch Transportation, Inc.	149,002	A	80-1717
Southern California Transit Co.	146,498	A	80-2070
Lupe, Inc.	153,951	B,D	80-1643
Golden State Transit Corp.	149,825	B,C,D	80-1485
The F. Michael Crawford Corp.	151,680	B-1	80-1709
Celebrity Private Car Service	149,429	B-1	80-1642
A & W Cab Company, Inc.	153,851	C	80-1358
High Land Transit Co.	149,802	C-1	77-1167 80-1608
Red and White Cab Co.	146,499	C-2	80-1356
Yellow Cab Co. of Culver City, Inc.	151,570	D	80-1787
James D. Mitchell	153,331	D	80-2101
Wilmington Cab Co.	146,501 149,699	E	80-1246
Los Angeles City Cab Co., Inc.	149,803	B-2	80-1365

2. That the subject files be referred back to the Transportation and Traffic Committee for submittal of its recommendations regarding the renewal of existing 13 taxicab franchises and other recommendations of the Board of Transportation.

SUMMARY

The Comprehensive Taxicab Study, as approved by the Board on September 3, 1980, recommends extensive upgrading of franchise terms and conditions as the franchises are renewed.

Your Committee has been advised that the franchises of all thirteen (13) existing taxicab companies in the City of Los Angeles will expire on 12-31-80, having been

extended to that date from 10-31-80. Each company submitted an application for franchise renewal to the City Council whereupon it was referred to the Board of Transportation Commissioners for report.

At a special meeting held on September 3, 1980, the Board in summary approved the following recommendations:

1. Five-year replacement taxicab franchises for five companies.
2. A four-month probationary franchise with the provision for extension to five years on affirmative findings of compliance by the Board for seven companies.
3. Denial of application for renewal for one company.
4. Changes of ownership be subject to Council approval.
5. That Section 71.05(b) of the Los Angeles Municipal Code be amended to provide for an increase in vehicle permit fees for associated taxicabes.

In addition the Board approved a recommendation to "temporarily" extend 13 existing taxicab franchise from 10-29-80 to 12-31-80. The City Council adopted ordinances extending said franchises to 12-31-80. The Board of Transportation Commissioners was scheduled to consider an additional three-month extension to 3-31-81 at its meeting on November 13, 1980 which was cancelled due to a lack of quorum.

In order for the ordinances to become effective 12-31-80, it will be necessary for the ordinances to be adopted by the City Council and published by 11-28-80. There is insufficient time for the Committee and the Council to deliberate on the Board of Transportation Commissioners' recommendation, review the comprehensive "Taxicab In-

dustry Study" and the Los Angeles County Interim Taxicab Industry Report and supplementary materials, conduct public hearings and prepare necessary ordinances to meet the 12-31-80 temporary franchise renewal dates.

Therefore, the Chairwoman of your Committee is recommending that the ordinances be adopted forthwith to extend the franchises "temporarily" to 3-31-81; and that the subject files be referred back to the Transportation and Traffic Committee for its consideration of the Department of Transportation recommendations regarding the renewal of the existing taxicab franchises and related matters of the taxicab industry.

Respectfully submitted,

Pat Russell, Chairwoman
TRANSPORTATION AND TRAFFIC COMMITTEE

CBP:jd
11-19-80

EXHIBIT 5

REPORT
DEPARTMENT OF TRANSPORTATION

E18
January 16, 1981

To: Board of Transportation Commissioners
Thursday, January 22, 1981

Subject: MODIFICATION TO THE PROPOSED RENEWAL TAXICAB FRANCHISES

RECOMMENDATIONS

I. That your Board approve the following modifications to the first three of the Board's September 3, 1980 recommendations to Council on Renewal of Existing Taxicab Franchises and submit these revisions for Council action.

A. Modified Recommendation No. 1

That upon approval of the Mayor and Council by Ordinance a multi-year replacement taxicab franchise, that will expire on March 31, 1985, be granted to:

LUPE, INC.
GOLDEN STATE TRANSIT CO.
CELEBRITY PRIVATE CAR SERVICE
WILMINGTON CAB COMPANY
MONARCH TRANSPORTATION, INC.
THE F. MICHAEL CRAWFORD CORP.

B. Modified Recommendation No. 2

That upon approval of the Mayor and Council by Ordinance a one year franchise, which will expire on March 31, 1982 with a provision for renewal to March 31, 1985 upon affirmative findings by the Board of continuous compliance

with all terms and conditions thereof and upon approval of the Mayor and Council by Ordinance, be granted to the following:

A&W CAB CO.
HIGH LAND TRANSIT CO.
YELLOW CAB COMPANY OF CULVER CITY, INC.
JAMES D. MITCHELL
SOUTHERN CALIFORNIA TRANSIT CO.
RED AND WHITE CAB CO.
LOS ANGELES CITY CAB COMPANY, INC.

C. Recommendation No. 3—Eliminate

Eliminate the recommendation that the application of Los Angeles City Cab Company, Inc. for a replacement franchise be denied.

II. That your Board approve the following modifications to the proposed replacement franchises that were approved by the Board on September 3, 1980 and submit these revisions for Council action.

A. Modification to Five Year Franchise

1. Redesignate as a multi-year franchise.
2. Revise Section 2.2 to indicate an expiration date of March 31, 1985.
3. Revise Section 4.2(e) to read as follows:

4.2(e) All taxicabs operated on behalf of this franchise shall be under the direct control of the Grantee. All present leasing/contracting to driver-owners is to be terminated immediately upon completion of the lease/contract and in no event later than July 1, 1981. Grantee shall offer to employ all such affected drivers under an employer-

employee arrangement. Beginning on July 2, 1981 Grantee shall not be permitted to provide taxi service through a contracting or leasing type operation with a driver-owner, but only by the operation of its taxicabs by employees and officers of the grantee. Any such authorization which may have been granted to franchisee, or any predecessor in interest of franchisee, is accordingly hereby revoked.

B. Modifications to Probationary Franchise

1. Redesignate as a one year franchise.

2. Revise the second and third paragraphs of Section 2.2.

Second paragraph revised as follows:

This franchise shall expire March 31, 1982.

The franchise will then only be renewed at the discretion of the Council, upon its adoption of the necessary ordinance, and provided the Grantee has demonstrated, to the satisfaction of the Board, continuous compliance with all franchise terms and conditions and specifically the following:

(a) Payment of franchise fees; (b) Compliance with all rules regarding leasing/contracting operations; (c) Furnish waybills and dispatch records; (d) Maintain minimum number of vehicles required by franchise; and (e) Compliance with Affirmative Action provisions of franchise.

Third paragraph be eliminated.

EXHIBIT 7

CITY OF LOS ANGELES
INTER-DEPARTMENTAL CORRESPONDENCE

E14

Date: January 26, 1981

To: Councilwoman Pat Russell, Chairwoman,
Transportation and Traffic Committee
Attention C. B. Pruner, City Clerk's Office,
395 City Hall

From: Board of Transportation Commissioners,
1200 City Hall

Subject: RENEWAL OF EXISTING TAXICAB FRANCHISES

Council Files 80-1717, 80-2070, 80-1643, 80-1485, 80-1709 80-1642, 80-1358, 77-1167, 80-1608, 80-1356, 80-1787, 80-2101, 80-1246, 80-1365

The franchises of all thirteen (13) existing taxicab companies in the City expired on October 29, 1980. They were subsequently extended, by Council actions, to March 31, 1981 in order to allow sufficient time for the Council to review the Board's September 3, 1980 recommendations on replacement franchises.

The Transportation and Traffic Committee at their meeting of December 10, 1980 considered the renewal of the thirteen franchises including the matter of leasing to driver-owners by franchised taxicab companies. The Committee recommended that the matter of leasing to driver-owners by franchised taxicab companies be referred back to the Board to request that the Board consider alternatives for the accommodation of driver-owners whose authority to lease would be discontinued by the terms of the proposed franchises. The Board was also requested to include any necessary modifications to the proposed franchises.

At its regular meeting on January 22, 1981, the Board of Transportation Commissioners approved certain revisions to their September 3, 1980 recommendations to Council on this matter. The revisions are discussed in detail on the attached Board approved report.

The following represents the Board's original recommendations as revised and is submitted for your action.

1. That a multi-year replacement taxicab franchise, that will expire on March 31, 1985, in accordance with the attached draft be granted to:

   LUPE, INC.
   GOLDEN STATE TRANSIT CO.
   CELEBRITY PRIVATE CAR SERVICE
   WILMINGTON CAB COMPANY
   MONARCH TRANSPORTATION, INC.
   THE F. MICHAEL CRAWFORD CORP.

2. That a one-year franchise, which will expire March 31, 1982, with a provision that it will then only be renewed at the discretion of the Council, upon its adoption of the necessary ordinance and provided the Grantee has demonstrated to the satisfaction of the Board continuous compliance with all franchise terms and conditions, be granted to the following:

   A & W CAB CO.
   HIGH LAND TRANSIT CO.
   YELLOW CAB COMPANY OF CULVER CITY, INC.
   JAMES D. MITCHELL
   SOUTHERN CALIFORNIA TRANSIT CO.
   RED AND WHITE CAB CO.
   LOS ANGELES CITY CAB COMPANY, INC.

3. That any change in ownership of the grantee shall be subject to Council approval.

4. That the Council amend Section 71.05(b) of the Los Angeles Municipal Code to provide for an increase in vehicle permit fees for taxicabs and that the revised

   Section read substantially in accordance with the accompanying draft.

In addition to the above recommendations, the Board adopted the following resolution by Commissioner Michael Bennett:

> "I move that all existing authorities for leasing of taxicabs by franchised companies to driver-owners, granted by the Board pursuant to 71.15 of the Municipal Code, be rescinded on a phased basis, that the companies be instructed to terminate the driver-owner relationship upon completion of their one-year contract and in no event later than July 1, 1981, and that the City Council be advised of this action of the Board."

This matter is being returned for your action.

/s/ Joy Ventura
JOY VENTURA
Acting Secretary
Board of Transportation
Commissioners

JR:jcv

Attachments

cc: All Franchised Operators

EXHIBIT 8

TO THE COUNCIL OF THE
CITY OF LOS ANGELES

77-1167, 80-1246, 80-1356, 80-1358, 80-1365, 80-1485, 80-1608, 80-1642, 80-1643, 80-1709, 80-1717, 80-1787, 80-2101, 80-2070, 80-4592, 77-1337, 77-5255, 76-105 &

Your TRANSPORTATION AND TRAFFIC Committee reports as follows:

RECOMMENDATION

In order to provide for the replacement of all thirteen existing taxicab franchises due to expire on March 31, 1981 and to provide for an increase in vehicle permit fees for taxicabs, we RECOMMEND, as recommended by the Board of Transportation Commissioners, as follows:

1. That the accompanying six ordinances, granting a multi-year replacement taxicab franchise, that will expire on March 31, 1985, for the following six existing taxicab franchises, approved as to form and legality by the City Attorney, BE PLACED UPON THEIR PASSAGE:

(Original Or As Assigned)
Franchise Ordinance No.

Company		Area	Council File No.
Monarch Transportation, Inc.	149,002	A	80-1717
Lupe, Inc.	153,951	B,C	80-1643
*Golden State Transit Corp.	140,825	B,C,D	80-1485
The F. Michael Crawford Corp.	151,680	B-1	80-1709
Celebrity Private Car Service	149,429	B-1	80-1642
Wilmington Cab Co.	146,501	E	80-1246
	149,699		

* Deleted and Continued to Feb. 17, 1981 [This line struck through in original document]

2. That the accompanying seven ordinances, granting a one-year franchise, which will expire March 31, 1982, with a provision that it will then only be renewed at the discretion of the Council, upon its adoption of the necessary ordinance and provided the Grantee has demonstrated to the satisfaction of the Board continuous compliance with all franchise terms and conditions, for the following seven existing taxicab franchises, approved as to form and legality by the City Attorney, BE PLACED UPON THEIR PASSAGE:

(Original Or As Assigned)
Franchise Ordinance No.

Company		Area	Council File No.
Southern California Transit Co.	146,498	A	80-2070
**A & W Cab Company, Inc.	153,851	C	80-1358
High Land Transit Co.	149,802	C-1	77-1167
			80-1608
Red and White Cab Co.	146,499	C-2	80-1356
Yellow Cab Co. of Culver City, Inc.	151,570	D	80-1787
James D. Mitchell	153,331	D	80-2101
Los Angeles City Cab Co., Inc.	149,803	B-2	80-1365

***Deleted and Referred back to Board of Transportation Commissioners, Substitute Ordinance Adopted extending existing franchise to May 31, 1981.* [This line struck through in original document]

3. That the Council be advised that all the franchise ordinances include the following provisions:

   a. That any change in ownership of the grantee shall be subject to Council approval.

   b. That all taxicabs operated on behalf of the franchise shall be under direct control of the grantee, requiring all present leasing/contracting to driver owners to be terminated immediately upon completion of the lease/contract but no

later than July 1, 1981. Grantee shall offer to employ all such affected drivers under an employer-employee arrangement. Thereafter, the operation of the taxicabs will be only by employees and officers of the grantee.

c. That all taxicab operators participate in the City-sponsored transportation coupon (user-side subsidy) program.

d. Grantee is to make a base franchise payment of $41.67 per month for each sealed taxicab (equals $500 per year) with an incremental increase of up to doubling of the payment based on the level of services. This is similar to the fees for the two associations in Recommendation No. 4.

4. That the accompanying ordinance amending Section 71.05(b) of the Los Angeles Administrative Code to provide for an increase in vehicle permit fees for taxicabs of the existing associations from $250 annually to $500 per year, with an incremental increase of up to $500 per year based on the level of service, approved as to form and legality by the City Attorney, BE PLACED UPON ITS PASSAGE.

SUMMARY

The franchise of all thirteen existing taxicab companies in the City expired on October 29, 1980. They were subsequently extended, by Council actions, to March 31, 1981 in order to allow sufficient time for the Council to review the Board's recommendations on the matter.

The Comprehensive Taxicab Study, as approved by the Board on September 3, 1980, recommends extensive upgrading of franchise terms and conditions as the franchises are renewed.

At a special meeting held on September 3, 1980, the Board in summary approved the following recommendations:

1. Five-year replacement taxicab franchises for five companies.
2. A four-month probationary franchise with the provision for extension to five years on affirmative findings of compliance by the Board for seven companies.
3. Denial of application for renewal for one company.
4. Changes of ownership be subject to Council approval.
5. That Section 71.05(b) of the Los Angeles Municipal Code be amended to provide for an increase in vehicle permit fees for associated taxicabs.

The Transportation and Traffic Committee at its meeting on December 10, 1980, in considering the recommendations of the Board for renewal of the thirteen franchises including the matter of leasing to driver-owners by franchise taxicab companies, submitted the franchises back to the Board for any necessary modifications and consideration of alternatives for the accommodation of driver-owners whose authority to lease would be discontinued by the terms of the proposed franchises.

The Department reviewed all of the thirteen companies and updated the status of each in regard to their eligibility for a multi-year franchise. In lieu of the original recommendations, the Board recommended that a multi-year replacement taxicab franchise, to expire on March 31, 1985, be granted to six franchisees.

The Department also recommended that a one-year franchise, to expire on March 31, 1982, with a provision for renewal to March 31, 1985 upon affirmative findings by the Board of continuous compliance with all terms and conditions thereof and approval by ordinance, be granted to seven companies.

The Board not only recomended substantial changes in the types of franchises to be provided but also recom-

mended certain changes as to the status of the individual franchise companies under the full term versus provisional franchise.

The six companies listed in Recommendation No. 1 (full term) are in compliance with all terms and conditions of their franchise including these five specific conditions: (a) Payment of franchise fees; (b) Compliance with all rules regarding leasing—contracting operations; (c) Furnish waybills and dispatch records; (d) Maintain minimum number of vehicles required by franchise; and (e) Compliance with Affirmative Action provisions of franchise.

Monarch Transportation, Inc. and The F. Michael Crawford Corp. were added to the 4-year list while Red and White Cab Company is now recommended for a one-year franchise due to possible violations of the rules regarding leasing/contracting operations with driver-owners.

Under Recommendation No. 2, A&W Cab Company, High Land Transit Company, Yellow Cab Company of Culver City, Inc., Southern California Transit Company, and possibly James D. Mitchell are also in violation of rules regarding leasing/contracting with driver-owners. Southern California Transit Company does not have its required 30 vehicles in service yet.

The Board originally recommended that Los Angeles City Cab Co., Inc. lease not be renewed based upon numerous violations of the franchise terms and conditions of the franchise and Department directives as enumerated in the Department staff report. In the past four months, however, City Cab has been actively involved in bringing its operation in compliance with the franchise terms and conditions and Department directives. Insurance problems have been resolved and the Company has eliminated all but three of its illegal driver-owners and is in the process of resolving this matter. The Department has been receiving requested records and documents from the

Company. The Department therefore now recommends that this franchise be included under Recommendation No. 2 for a provisional one-year franchise.

It is noted that the one-year provisional franchise will allow the Department an opportunity to periodically review compliance with all franchise terms and conditions and develop the proper recommendation for extension to March 31, 1985. It will provide a period of time in which the companies must phase out their driver-owners and the Department can monitor the phase-out to determine compliance by July 1, 1981.

The proposed terms of the new franchises requiring the elimination of the franchise company's lease authority with driver-owners will create a problem that is difficult to resolve. The Department has explored this problem for a possible solution that would be acceptable to the driver-owners, companies and City.

The Department estimates that a total of at least 149 driver-owners, including 60 that are unauthorized, would be affected by the elimination of the authority for leases and contracts between franchise companies and driver-owners. The Department studied several alternatives for absorption of the driver-owners, e.g. driver-owners to be absorbed by the two existing independent associations; permit driver-owners to form a new independent association; or driver-owner to become an employee. It was concluded that the independent associations' options were not viable and that the most feasible solution to the problem is to combine a phase-out of driver-owners (as contracts run out) with a requirement that each company offer to hire driver-owners as employees. The leasing and contracting to driver-owners is to be terminated as the agreements lapse and in no event later than July 1, 1981. It was noted that many of the present agreements were signed in early 1980 for a one-year period with option

to renew, conditioned upon continued sanction by the City of Los Angeles.

The former driver-owners would have the option of being hired as commission drivers or as fixed fee employees (pass-through) drivers. In either case they would be employees of the company, utilizing company taxis, and be provided, pursuant to Federal and State statutes, full social benefits, i.e., Social Security, Unemployment Insurance and Workers' Compensation.

There are various alternatives possible insofar as the current driver-owners who own their own taxicabs. They could sell their vehicle to the company through a contract that would allow the driver-owner an opportunity to recover his investment in the vehicle and provide a credit on his initial "sign-up" fee; it could be a direct sale of the vehicle to the taxicab company; and there could be an arangement where a taxi could be sold to a leasing company for an interest in the company and subsequently leased, as suggested by A & W Cab Company or High Land Transit, and become part of the company's taxi fleet.

Converting the driver-owner to an employee and absorbing his vehicle into the company's commission fleet will provide the driver with the protection of social benefits, which the Board of Transportation Commissioners has vigorously advocated, and at the same time provide a positive control of the driver and vehicle.

On November 20, 1980, the Board of Transportation Commissioners approved the Department's recommendation to include in the new taxicab franchises a requirement that all operators participate in the City-sponsored transportation coupon (user-side subsidy) program.

Your Committee conducted a public hearing with regard to the subject renewal of taxicab franchises, with no ap-

parent dissent by the involved franchisees. There was no response from the representatives of the (A&W) owner-driver association. The representatives of the independent associations suggested that the franchise operators should not be allowed to lease at all, whether employees or not, and they felt that there was favoritism in the provisions of the franchises toward the franchise companies in relationship to the desires of the associations. The Teamsters Union, which represents the employees of the Yellow Cab Company, indicated support for the franchise provisions.

The franchise renewals provide a fixed franchise fee of $41.67 per month ($500 per year) with an incremental increase of up to doubling of the payment, based on the level of service, similar in impact to the new fees being recomended for the two associations. The grantees previously were paying 1% of the total gross receipts from their taxicab operations, which is estimated at $50,000 of receipts per year per cab, with up to an incremental additional 1% based on level of service. This new payment should approximate the receipts from the old method but will be easier to administer.

The Yellow Cab Company indicated that it should not have to pay fees for taxicabs that are "out of service." The Department indicated that usually these taxicabs are out of service only temporarily and that any permanently disabled taxicabs could be administratively credited.

The two associations feel that their vehicle permit fees should not be increased from $250 annually to $500 annually, with a concurrent doubling of the incremental increase based on the level of service. The associations feel that they should not have to pay the $500 in one lump sum and should be able to pay in monthly installments similar to the payments by the francisees for their sealed taxicabs. The Department indicated that it would

review this request and the feasibility of collecting the fees from the associations rather than individual taxicab owners.

Respectfully submitted,

TRANSPORTATION AND TRAFFIC COMMITTEE

CBP:jd
2-2-81

[Motion adopted to approve Comte. Rec. Feb. 11, 1981—Los Angeles City Council as amended to the Mayor forthwith—* Ord. relating to Golden State Transit Corp. deleted and continued to Feb. 17, 1981]

EXHIBIT 11

MINUTES OF MARCH 23, 1981, CITY COUNCIL MEETING

March 23, 1981
Council File No. 80-1485
Item No. 14

At this point in the proceedings, Mrs. Russell was recognized in keeping with Item No. 14 on this day's Council Calendar.

Mrs. Russell presented the following Motion and moved, seconded by Mr. Farrell, its adoption:

MOTION

WHEREAS, the taxicab franchise granted to Golden State Transit Corporation, dba Yellow Cab Company, to operate upon certain streets in the City of Los Angeles, is presently due to expire March 31, 1981; and

WHEREAS, the City Council did previously act to extend such franchise to April 30, 1981, provided it was determined, on or before March 27, 1981, that it is in the best interest of the City to allow for such extension; and

WHEREAS, there are presently uncertainties relating to such franchise which will require investigation by the Department of Transportation; and

WHEREAS, it would not be in the best interest of the City to allow for such franchise to expire March 31, 1981;

NOW THEREFORE, it is hereby found and determined that it is in the best interest of the City to allow for such extension to April 30, 1981.

Moved by /s/ Pat Russell
PAT RUSSELL
Councilman
Sixth District

Seconded By /s/ Robert Farrell

[Mar. 23, 1981—Failed of Adoption]

The subject, as indicated on the Calendar, was consideration of possible findings required under Ordinance No. 154,931 to extend the terms of the taxicab franchise (Golden State Transit Corporation dba Yellow Cab Company), from March 31, 1981 to April 30, 1981.

Mrs. Russell moved, seconded by Mr. Farrell, that a Public Hearing of ten minutes duration be authorized to hear from those persons in the audience that wished to express their views.

The motion for Public Hearing was approved by unanimous vote.

The Council then heard from the following persons: Eugene Maday; Hugo Morris, Joint Council of Teamsters No. 42 and Local 572; David I. Shapiro; and Steve Robertson, Los Angeles Federation of Labor.

While each ofthe foregoing speakers expressed their own views, stated during the commentary were concerns by Mr. Maday that the City was intervening in a labor dispute (by the actions being considered) involving the company and the Teamsters. The other speakers indicated that no great taxicab shortage had taken place during the period of time the franchise holder taxicab was out of operation. It was also the labor organization speaker's contention that the employer (Yellow Cab) was bargaining "in bad faith" with the taxicab drivers employed by that company, thus to grant an extension of time and/or grant a further franchise to the company would not be in the drivers interests.

After the foregoing speakers had expressed their views, and as there were no other persons in the audience that wished to address the Council on the subject, the Public Hearing was closed.

At this point in the proceedings the following persons were assembled at the table within the Council semi-circle to answer questions and/or make statements if called

upon to do so: Donald Howery, General Manager, Department of Transportation; Neil Clark, Principal Transportation Engineer, Department of Transportation; and John Haggerty, Assistant City Attorney, Office of the City Attorney.

The measure was debated at length and during the commentary Mr. John Haggerty, representing the City Attorney's Office, advised the Council that the findings referred to in Mrs. Russell's Motion would have to be approved by the Council by March 27, 1981 if the extension indicated in the Motion was to be authorized. If the extension was granted, an ordinance granting a new taxicab franchise to Yellow Cab Company would have to be approved by the Council, signed by the Mayor and published on or before March 31, 1981, if, in fact, the indicated company was to retain the franchise. The franchise could not be authorized at a later date, the Council was advised, without the usual bidding procedure.

During the discussion, various Council members were recognized and expressed their views.

Following all commentary, Mrs. Russell's Motion failed of adoption by the following vote: Roll — (2-10)

The Chair advised that the Motion had failed and thereafter recognized Mr. Gibson. Mr. Gibson indicated that it had been his intention to vote "No" on the Motion.

It was agreed that the record would show Mr. Gibson's intention, and theafter the Clerk was instructed to proceed with the next order of business.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 81-1519 AAH (Gx)

GOLDEN STATE TRANSIT CORPORATION,
a California corporation, doing business as
Yellow Cab of Los Angeles,
Plaintiff.

vs.

CITY OF LOS ANGELES, a municipal corporation,
Defendant.

DECLARATION OF EUGENE MADAY IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER

I, the undersigned, declare:

1. My name is Eugene Maday. I am the president and controlling shareholder of plaintiff Golden State Transit Corporation, d/b/a/ Yellow Cab of Los Angeles ("Yellow Cab" hereafter). If called to testify as a witness, I would testify completely to the following facts based upon my personal knowledge.

BACKGROUND OF PLAINTIFF'S PURCHASE OF YELLOW CAB

2. In or about 1977, Yellow Cab's Los Angeles' predecessor was affiliated with the Westgate-California group of companies and was in bankruptcy or receivership. The bankruptcy receiver, Robert N. Mateer ("Mateer") was seeking a purchaser for the bankrupt's assets, including the Los Angeles City taxi franchise. At that time, the bankrupt was not operating pursuant to its franchise

and was unionized. The bankrupt's drivers were unionized through Teamster's Local No. 670 and were represented by Hugo Morris ("Morris") who also represented Joint Council of Teamsters No. 42. Mateer and Morris approached me and urged me to purchase the bankrupt's assets, including the franchise. Transfer of the franchise was required to be approved by the Los Angeles City Council ("City Council").

3. Richard Burlingame, an employee of the receiver and former employee of the bankrupt told me that getting the franchise renewed had always been automatic and that no Los Angeles taxicab franchise had failed to be renewed.

4. On or about April 1, 1977, Mateer told me there would be no problem if I bought the Company in obtaining the transfer of the existing franchise and even less problem in getting it renewed. I caused Golden State Transit Corporation to be formed to effectuate the purchase.

5. On May 17, 1977, plaintiff paid the receiver approximately $550,000 for the assets, including the right to use the name "Yellow Cab of Los Angeles" and, subject to City Council approval, all rights under the existing franchise.

6. On or about March 23, 1981, the president of Los Angeles City Council characterized plaintiff's purchase of the old company, after several months of no taxicab service in Los Angeles as bailing "the city out, not only with his generosity, but with the aid and help of the [teamsters] union." A true and correct transcript of the City Council hearing of March 23, 1981 is attached hereto, marked Exhibit 15 and incorporated reference.

7. In early May, 1977, Plaintiff applied for City Council approval of the franchise transfer. At that time, Robert W. Russell was General Manager of the City of Los Angeles' Department of Public Utilities (now the

Department of Transportation) responsible for investigating proposed taxicab franchise transferees. About the end of May, 1977, Mr. Russell visited my offices. He told me personally that obtaining transfer of the Yellow Cab franchise would "take a little work," but that renewals "had always been automatic."

8. In July, 1977, the City Council approved transfer of the franchise to plaintiff and the transfer was affected. The transferred franchise was to expire October 29, 1980.

9. Thereupon, Yellow Cab undertook to and did operate pursuant to the franchise.

10. Upon plaintiff's formation, I paid $250,000 to plaintiff for all of its 25,000 shares of outstanding stock. I remain sole owner of all of plaintiff's outstanding stock. Since then, I have paid $736,325 additional capital into plaintiff and have personally advanced to plaintiff an additional $685,301. I am sole shareholder of Leisure Industries, Inc. which has loaned to plaintiff $427,172.

11. Since obtaining the franchise, plaintiff has purchased more than three million dollars worth of vehicles to improve and upgrade the quality of its fleet. Plaintiff is the largest taxicab operator in the City of Los Angeles with approximately 400 vehicles.

UNION AGREEMENT

12. Upon obtaining the franchise, plaintiff operated pursuant to a collective bargaining agreement with its Teamster drivers. The agreement expired in October, 1980. Plaintiff continued to operate pursuant to interim agreements with the Teamsters, but the parties continue to dispute regarding wages and benefits. This dispute has been and is subject to mediation by the Federal Mediation and Reconciliation Service. Plaintiff has been and continues to act in good faith to resolve the dispute. On February 11, 1981, plaintiff's drivers went on and remain on strike.

FRANCHISE RENEWAL

13. More than a year ago, on March 31, 1980, in anticipation of the October, 1980 franchise expiration date, Yellow Cab made written application to the City for renewal of its franchise and paid its $200 application fee (Exhibit 1 to Declaration of John B. Rice filed herewith). On April 1, 1980, the application was referred to the City's Board of Transportation Commissioners ("Board") for report. At that time, all thirteen (13) taxicab franchises in the City were also due to expire in October, 1980, and all other franchises also applied for renewals.

14. The Department of Transportation requested and on July 14, 1980 received an extension until September 15, 1980 to report on the thirteen franchise applications.

15. Meanwhile, the City (by the staff of its Department of Transportation) was engaged in a comprehensive taxicab study which culminated in a Report dated August 14, 1980 (Exhibit 12 attached hereto) which recommended that Yellow Cab and ten other franchisees be granted six month probationary franchises to be extended to five year franchisees under certain conditions. Yellow Cab was then and is now in full compliance with these conditions. The Report also recommended 5-year renewal of one franchise and non-renewal of another franchise.

16. During 1980, the City Council granted temporary franchise extensions to all thirteen operators, first until December 31, 1980 and then until March 31, 1981 (Exhibits 2 and 4 to Declaration of John Rice filed herewith). Various reports and recommendations form the staff of the Department of Transportation and Commissioners culminated in scheduling City Council action on long-term franchises for February 11, 1981.

17. But Yellow Cab and the Teamsters had still been unable to agree to a long-term labor contract. A short-

term agreement was scheduled to expire at midnight February 10, 1981 on the eve of scheduled Council action.

18. I am informed and believe and on such grounds allege that the Teamsters determined to use the franchise extension proceedings as a lever to force Yellow Cab to accede to their demands.

19. By letters dated February 5, 1981, the Teamsters notified the Mayor of Los Angeles and City Council of their intention to strike Yellow Cab on February 11—the date of scheduled Council action—unless an "acceptable settlement" was achieved. Copies of these letters, marked Exhibits 13 and 14 are attached hereto and incorporated herein by reference.

20. No settlement was reached and the Teamsters struck Yellow Cab on February 11, 1981.

21. On that date, the Council's Transportation and Traffic Committee submitted a report (Exhibit 8 to Declaration of John Rice filed herewith) to the Council which recommended that the City pass ordinances granting four year franchises to Yellow Cab and five other operators.

23. The report at page 4 specifically found that Yellow Cab and those five other operators "are in compliance with all terms and conditions of their franchise."

24. According to what I have been told by Jack Arvan, General Manager of plaintiff, Hugo Morris of the Teamsters appeared before the City Council on February 11, 1981. He detailed the labor dispute and urged that, because of the dispute, the Council should not grant a full four-year franchise to Yellow Cab. (See Declaration of Jack Arvin filed herewith).

25. I am informed and believe and on such grounds allege that because of Teamster opposition, the Council continued consideration of Yellow Cab's application to February 17, 1981. But the other applicants were treated differently. The council proceeded to grant four-year

franchises to the five other operators as well as one-year franchises to six additional operators. Also, the Council nonetheless adopted the finding that Yellow Cab was in compliance with all terms and conditions of its franchise (Exhibit 8 to Declaration of John Rice filed herewith).

26. On or about February 17, 1981, Jack Arvan, plaintiff's General Manager, informed me that Bill Tico, business agent for the Teamsters, had threatened that "if Maday doesn't settle his labor dispute, he's going to have a lot of truble renewing his franchise." (Declaration of Jack Arvin filed herewith).

27. On February 17, 1981, the Yellow Cab renewal ordinance was not presented for adoption. Instead, at the Teamster's urging, and contrary to the Department of Transportation recommendation, the City Council adopted a substitute ordinance to extend Yellow Cab's franchise only until April 30, 1981 and subject to the condition that the Council make an affirmative finding that it was in the "best interest" of the City of allow the extension. No other franchise except Yellow Cab was subject to such a condition. I am informed and believe and on such grounds allege that the City's governing procedural ordinance makes no provision for such a finding as a condition to the grant of a renewal franchise.

28. On Sunday, March 22, 1981, Hugo Morris, the Teamster representative, said personally to me, "We are going to see that the City revokes or does not renew your franchise if you do not meet our demands."

29. On March 23, 1981, the City Council met to consider whether it was in the "best interest" of the City to allow Yellow Cab the one month extension of its franchise. The Council invited parties to "express their views." I urged the Council to grant the extension to avoid intervening in the labor dispute. The Teamsters urged denial of the extension because, they contended, Yellow Cab was bargaining "in bad faith" with the

drivers and that to grant a further extension would not be in the *driver's* best interests. A transcript of the City Council meeting is attached hereto marked Exhibit 15 and incorporated herein by reference ("Transcript").

30. The Teamster representative recited to the Council the purported "modest" demands labor was making on Yellow Cab and Yellow Cab's purported intransigence. He reported that the striking workers had voted, with only one dissent, "to endorse the position that the franchise not be extended. . ." He said he hoped that present Yellow Cab employees "would be hired by whatever successor is established" for Yellow Cab. (Transcript, page 5).

31. The AFL-CIO representative, representing the "brothers and sisters" of the Teamsters, reminded the Council that there are 700,000 union members in the County (Transcript, page 8), claimed that Yellow Cab was acting in "bad faith," and urged denial of the franchise. (Transcript, page 9).

32. The President of the Council stated that "it will be very difficult to get this ordinance passed to extend this franchise if the labor dispute is not settled by the end of this week . . ." and that "both sides should realize that [if] it is not done by the end of this week, that there is a very good possibility that there will not be a . . . franchise for Yellow Cab, it will lapse, it will be open to . . . other . . . companies." (Transcript, page 21).

33. Thereupon, the Council voted to defeat the motion which recommended that the Council find that it would be in the best interests of the City to extend the franchise. Yellow Cab was thereby denied even a thirty day extension of its franchise.

34. At no point in the franchise renewal proceedings was plaintiff notified that any evidentiary or fact finding hearing would be held to determine whether the franchise should be renewed. Plaintiff was never offered an opportunity to present sworn testimony, to offer admissible evidence, or to cross-examine opposing parties under oath. The only factual findings adduced were that plaintiff was in full compliance with all the terms of its franchise.

35. The refusal of the City to grant plaintiff a four-year franchise when five other operators obtained such franchises under similar circumstances was arbitrary and capricious, and was based solely upon political consideration of the financial resources and voting power of the City's large union population. Several members of the City Council are persently engaged in reelection campaigns for an election to be held in less than one month. One of the council members is running for the office of City Attorney in the same election. The City's mayor is also running for reelection in that election.

36. I feel as if the City Council has "put a gun to my head" in threatening franchise expiration unless plaintiff accedes to the Teamster demands. The city has severely damaged if not destroyed my ability to bargain with the union.

37. Unless this Court grants the temporary restraining order as requested, Yellow Cab's franchise will lapse March 31, 1981. Loss of the franchise will cause irreparable injury to Yellow Cab. Yellow Cab will be completely forced out of business with major or total loss of investment.

I declare under penalty or perjury that the foregoing is true and correct and that this declaration was executed on the 30th day of March, 1981 at Los Angeles, CA.

/s/ Eugene Maday
EUGENE MADAY

EXHIBIT 13

JOINT COUNCIL OF TEAMSTERS NO. 42

[Letterhead]

February 5, 1981

Mayor Tom Bradley
City Hall
Los Angeles, CA 90012

Dear Mayor Bradley:

Enclosed for your information is a copy of a letter to John Ferraro. The same letter has been sent to all members of the City Council.

We appreciate your continuing interest in this matter.

Sincerely,

Hugo Morris, Director of Public Affairs
JOINT COUNCIL OF TEAMSTERS NO. 42

HM:bv

cc: Eugene Maday
Alan Friedman
Jerry Cremins
Robert Chick
Donald Howery
Fran Savitch
Julie Sgarzi
Bill Robertson

EXHIBIT 14

JOINT COUNCIL &OF TEAMSTERS NO. 42

[Letterhead]

February 5, 1981

Hon. John Ferraro
Councilman, 4th District
City Hall
Los Angeles, Calif. 90012

Dear John:

This letter is to inform you of the current status of the Yellow Cab negotiations.

In December, agreement was reached on a short-term contract ending at midnight on February 10, 1981.

We have been meeting with the company this week and are scheduled to continue negotiations over the weekend. Membership meetings have been set for Monday the 9th to approve or disapprove whatever proposal results from the discussions. If it is not possible to achieve an acceptable settlement, there will be a strike on Wednesday, February 11th. We will make every effort to arrive at a settlement that will prevent this from happening.

The company and the union are very conscious of the fact that on February 11th the Council is expecting to consider two matters that have great impact upon the negotiations:

1. The franchise ordinance which includes the requirement of employer-employee status for all drivers.
2. The rate increase for Yellow Cab.

The union strongly supports both recommendations as necessary to the establishment of a viable company op-

eration with reasonable working conditions for the drivers.

If you have any questions or concerns that you would like to discuss prior to the Council meeting on Wednesday, please call my office so that arrangements can be made for a meeting with you or a member of your staff.

Sincerely,

Hugo Morris, Director of Public Affairs
JOINT COUNCIL OF TEAMSTERS NO. 42

HM:bv

EXHIBIT 15

TRANSCRIPT OF CITY COUNCIL PROCEEDINGS

BY MR. FERRARO:

That is approved and we have a forthwith to the Mayor there is no objections that will be the order. Next item. Mr. President number 14 was called the Motion of Valdez by Mrs. Russell relates to number 14. Mrs. Russell we do have one card to be heard.

BY MS. RUSSELL:

Mr. President, members of Council, item number 14, as you can see on the calendar has to do with the extension of the Yellow Cab Franchise and is something that we have looked at in Council for a while.

I'd like to check on your Motions and look at the Motion I've brought in this morning which is 14A. This is something that we will discuss. Let me just give you the brief report on the Motion, I will then move for a public hearing Mr. President and then I would like to speak again after the public hearing, to help clarify for the members where we are, but the Motion clarifies for you the situation where we are whereas the taxicab franchise granted to Golden State Transit Corporation, that is, Yellow Cab Company to operate upon certain streets in the city of Los Angeles is presently due to expire March 31, 1981 and whereas the city council previously extended such franchise at April 30, provided it was determinted on or before March 27, 1981 that it is in the best interests of the City to allow for such extension, that's the situation we have before us now. The Motion goes on to say whereas there are presently uncertainties relating to such franchise which will require investigation by the Department of Transportation and we do need to get a report from the Department I will speak to that later.

Now, the last two paragraphs we need to look at and they are what I think we will hear about in the public hearing whereas it would not be in the best interests of thet City to allow for such franchise to expire March 31, 1981, therefore, it is hereby found and determined that it is in the best interests of the City to allow for such extension to April 30, 1981. This is the question members of council that you will be deciding today and I think you will want to listen for in the public hearing as I will move for in the public hearing.

BY MR. FERRARO:

Alright, there are no objections to the public hearing, but before we have the public hearing, Mrs. Russell, could we have the staff come to the center table and if they want to add anything before the public hearing? Or do you want to wait until after?

Alright. If you could come to the center table. Alright the, Mrs. Russell, how do you want those, those in favor or those opposed, or just one of each? Alright. Mr. Maday, Eugene Maday is in favor, take the center microphone, Mr. Maday, and . . . alright, members of the Council, could we have your attention please. Go ahead, Mr. Maday.

BY EUGENE MADAY:

Ladies and gentlement, my name is Gene Maday, I would like to speak on the impending proposal. I don't think there should be a public hearing, I think my franchise should be granted to me the same as it has been granted to the other companies for approximately a five year period. We are in the middle of the labor dispute. The teamsters are using this as nothing but a ploy and using you people to try to settle their labor disputes. I do not think that this is proper, I do not think that the City should be involved in the labor disputes, I do not think that the Teamsters should call upon the City to do

their dirty work. There have been an awful lot of lies, innuendos, statements taken out of context which the Teamsters have used against me and they are trying to use these things to influence you people to do their bidding and to put Yellow Cab out of business like they did then last time and trying to take control of the company for their own personal gain. Thank you.

BY MR. FERRARO:

Alright, Mr. Hugo Morris.

BY HUGO MORRIS:

I'm Hugo Morris, representing the Joint Council of Teamsters #42 and Local 572 of the Teamsters which represents the cab drivers at Yellow Cab. Four years ago we urged the Council to approve the franchise transfer to Yellow Cab to protect the jobs of the drivers that were put out of work because of the bankruptcy of Yellow Cab, notas Mr. Maday just stated where Yellow Cab, he alleged, was put out of business by the Teamsters. Now to our great regret we are asking that Yellow Cab franchise not be extended.

Why are we doing this? Mr. Maday said six months ago that he didn't want a union contract in Los Angeles, but we have been trying to persuade him over the life of the prior agreement and during the past six months of our negotiations that Los Angeles is different from Las Vegas. That this is a city where people are entitled to decent wages and working conditions and he just said a minute ago that we are using this as a ploy. It's a strange ploy that would ask that the council not have the franchise renewed, because obviously we will end up without a contract with Yellow Cab. We have hopes that the people employed at Yellow Cab would be hired by whatever successor is established to cover the areas which Yellow Cab now covers, either in existing franchise or some new franchise. We do not have any assurance or guarantee of that other than insurance from one

current franchisee that is willing to hire those cab drivers in order of seniority to be covered by that franchise, if the franchise should be expanded to cover this area, of course that is not determined. This is not a matter of negotiation ploy at all. Mr. Maday has said that he does not want to sign a union contract and all of his activities during the past six months involving 20 negotiations meetings have been to that effect. I don't want to burden you with all the details of the negotiations, we have the files and tried to keep you in touch with the negotiations as they have developed; you have been aware of everything that has happened. The contract was extended from October until February in order to try to reach an agreement. The franchise was extended three months already from December 31 until March 31. We have tried mediations through the Federal Mediation and Conciliation Service and through the Mayor's Labor Management Committee. Our proposals were extraordinarily modest. Forty-six percent of the revenue, less half the cost of gas, and if anyone is interested I would be happy to go into detail. That compares with the Contract of Wilmington where they pay, the company pays 50% and the company pays the full cost of gasoline. We proposed that contract to Mr. Maday at the outset of negotiations and have gone down from that point to the point where we were last week. There was a meeting last Sunday, a week ago yesterday. The company made a worse proposal than they had before. The strike has now been going on six weeks. The cab drivers have been put to the wall. They voted almost unanimously, with one dissenting vote last Thursday to endorse the position that I am stating to you, which is that the franchise not be extended for all the reasons stated in the letters that were sent to you. An extension of four weeks could mean four weeks more of a strike with no hope of settlement, Mr. Maday said in the paper today that he expects the strike to be a long one, maybe as long as six months, that means a lot

of people out of work for that extensive period of time, if an extension were granted. But it is not a matter of supporting one side or another as he stated in the press and as he stated here. It is a matter of achieving equity, decent conditions of work for cab drivers in Los Angeles so that they can earn a decent living with decent benefits and we hope that we can achieve that in the future with whoever is the franchise that follows Mr. Maday as the Yellow Cab franchise. We feel that it is in the interests of the City to have good service and the only way to get good service is by having people who are paid reasonably well, as indicated in the papers, the cab drivers earn between $150 to $200 a week including tips. We urge a no vote on the resolution before you so that steps can be taken as early as possible to open up the area to either a new franchise or an existing franchise. I won't go into the details of the National Labor Relations Board Complaint, the violation of the Commission Order on flow-through, the $6,000,000 which Mr. Maday refused to pay in violation of the Commission Order which provided for an extension of the flow-through, the flow-through was intended to go through the entity paying for the cost of gasoline which was not Mr. Maday, and he took that $6,500.00 without good cause and the Labor Commission so found and now there is an involuntary bankruptcy petition filed on behalf of the lawyer who worked for Mr. Maday over the last two years with a $53,000.00 claim which will be considered in the court. These are subsidiary matters, the main one being the one that I stated at the outset, but they are all part of the package that relates to what Mr. Maday's history has been and in particular his history recently in regard to this matter of the Yellow Cab franchise in L.A. We respectfully request that you do not extend the franchise.

BY MR. FERRARO:

Alright, we have David Shapiro.

BY MR. DAVID SHAPIRO:

David Shapiro, president of the United Independent Taxi Drivers. I would like to say that with the demise of the Yellow and 350 less taxis in Los Angeles, I would like to inform the Council that the drivers are now being served and are able for the first time in two and one-half years to make a decent minimal living. Secondly, the doormen of the major hotels of the city report to me that they are having better quality service with the demise of the Yellow Cabs than they have ever had before. I would like to comment on Mr. Morris's wish for a new franchise. I think that would be a terrible mistake. The problem about drivers not earning a living in Los Angeles is a flooding of the streets where they are diluted in terms of the limited numbers of people who ride taxis, and if only you would allow the system to exist as it is now and not further consider adding a new or replacement franchise. If we could only work out those numbers and other kinds of conditions would set the standards where a person wants to drive a taxi for a living for the rest of his life, then like today we would have a much better serving system and there would be hope for the public and the drivers of the City. Thank you.

BY MR. FERRARO:

Steve Robertson.

BY MR. STEVE ROBINSON:

President Ferraro, members of the Council, my name is Steve Robertson, Public Relations Director of the AFL-CIO. We entered into these negotiations with our brothers and sisters from Teamsters about six months ago in the anticipation that through the collective bargaining process we would be able to negotiate a union contract. Representing 700,000 union members of Los Angeles County who are very unhappy that the situation

is now, we have no union contract. In Los Angeles, and we believe the owner of the Yellow Cab company does not respect this, we have a healthy respect of the collective bargaining process and we believe that the strike is not in the best interests of the City. I would also like to point out that this council on all of the issues that are brought before you as far as Yellow Cab is concerned, has given us unanimous support. We believe that the Council has offered good faith, that there has been good faith from labor both from the Teamsters and the AFL-CIO, so we believe there has been bad faith from the employer. I would like to point out something that is very important in this situation. Most of the workers at Yellow Cab, most of the drivers are minorities. They earn between $150.00 and $200.00 a week. Many of them don't even make the minimum wage. We believe that they deserve better than this and that they aren't going to get it from the Yellow Cab franchise. Any extension of the franchise between March 31 will mean added weeks to the Yellow Cab's strike. We would like to see that strike settled. But there is no hope of reaching a negotiated settlement as far as we are concerned. The union membership of cab drivers voted to ask the City Council not to extend the franchise. We respect that vote and the AFL-CIO is asking you not to vote for the extension and not to vote for the franchise. Thank you.

BY MR. FERRARO:

Alright, that completes the public hearing, the ten minutes is up anyway and there is no one else that wants to be heard, so Mrs. Russell.

BY MS. RUSSELL:

Mr. President, members of Council, I would like to just give you a couple of pieces of information. We, I think, need to keep in mind that our responsibility on this issue is to give public service and to do the best we can in terms of providing good public transportation for

our citizens. As a matter of fact, in terms of taxis we have been moving that way in the last several years and months as all of you know. This particular issue as you know involves labor disputes. I think that we do not want to be involved in that labor dispute and we have heard people speak to that this morning. I think we have to recognize that simply by making a decision or by not making a decision that we have some involvement in the dispute, and we just have to accept that. Remembering that the basis for our decision really is public service, if we continue a franchise, we assist one side, if we do not continue a franchise, we assist the other side, that is the way it comes out. Our basic responsibility, though, is the service to the public and I think that's really where we have to be in our discussion. We also want to be fair to all of the parties involved and this includes the drivers, the owner, the union, but again, the people we have to be the most concerned about are the general public. I do want to close, and I think the members want an opportunity to make some comments and perhaps ask some questions, but I do want to say to the members of the Council that we have been working with the Department of Transportation who have spent clearly an inordinate amount of time on the taxi situation in general, and I will be bringing in a Motion tomorrow which will instruct the Department regardless of the outcome of today, but which will instruct the Department to make a study on the impact of the cab situation on the streets as we see it by now, of the service level, and then get back to us probably within 30 days on a report and giving us alternatives but will be able to move ahead.

BY MR. FERRARO:

Mr. Cunningham.

BY MR. CUNNINGHAM:

Thank you very much, Mr. President, members of the Council. I don't see how for the life of me we can put

our heads in the sand and not understand that the interests of the labor dispute has a direct bearing on the decision that we make here today. I think the degree Mrs. Russell has characterized it aptly so that to a degree that if we grant the extension we do give an edge to the existing operator and to the existing franchise operations. Mr. President, I don't know how for the life of me, any of us can hold our heads in the sand and not take a look at the impact and then take a look at what is happening in those negotiations. I mean, I don't think any of you if you were a cab driver would be willing to forego your medical benefits if you had had those at your previous contract, and if you have an operator whose sole objective, but maybe it might not be made an objective and I understand it is stated on several occasions, but apparently from his actions, the objects of the operator must have been certain that he breaks the back of the union. How do you get to the public interests and to the public services necessary? The way you get to it is to have an operating company that has labor peace, that has the kind of drivers that are courteous, and kind to the public, but who are also making a decent living at a decent wage for their families. $200.00 a week is, I'm sure if you stop to think about it, it certainly leaves them at the very minimum at the poverty level. I don't see any way which I could support this extension. The last time this matter was before us, we indicated very clearly to both sides involved that this Council did its proper duty and we were willing to grant a two month extension at that time to at least give an opportunity to the warring parties to come together and to try to resolve their differences. I think the Council was fair in that extent. I think it was unfair for an individual to come here and try to indicate to us that we believe that the workers want to put the very company that they work for out of business, because without a place to work, they have no income, but I still think that what

they are saying to us they don't intend to continue to be wage slaves or continue to be jacked around and jerked around at the whim and caprice of the owner or operator of that facility. I think it would be wise for us as members of this Council to clearly make a statement by turning down this extension as soon as there is an agreement, we can certainly reopen the matter and be able to extend the franchise. Let me ask those at the table, when does the franchise die? March 31? Right?

BY JOHN HAGGERTY, ASSISTANT CITY ATTORNEY:

Yes. As and now the franchise dies March 31st.

BY MR. CUNNINGHAM:

And if there is an action before March 31, the Council can respond. Right?

BY MR. JOHN HAGGERTY:

Well, the Council would have to make the necessary findings by this Friday at the latest for the extension to go until the end of April. For it to go beyond the end of April, a second ordinance or new ordinance would also have to be passed and published by the end of this month.

BY MR. CUNNINGHAM:

So you are saying on Friday the Council could take action, that would still give a timely activity to the extension of the franchise.

BY MR. JOHN HAGGERTY:

Well, yes. Counsel has to make the necessary findings by this Friday at the latest to extend the franchise to April 31. For the franchise to be extended beyond that an ordinance would also have to be passed and published by the end o (sic) this month.

UNKNOWN

Well, I think . . .

BY MR. CUNNINGHAM:

Has this been clearly stated to the parties at odds in this matter?

BY MR. HAGGERTY:

It has been clearly tated (sic) to those people who have contacted me and asked me, yes.

BY MR. CUNNINGHAM:

So you don't know whether the parties at odds or not, you just know that theparties (sic), people who have contacted you, you have stated and made it clear to them. Mr. President, I think that the Council stil (sic) has time to act and on the other hand, the parties have time to act. And if there is good faith and there is reasonableness etween (sic) parties, then with the deadline of Friday staring them in the face, despite no matter how one person might want to charcterize (sic) us on the City Counciy, yes we do respond to pressure, we do respond to the concerns of those who are constituents of mie (sic), and I want to make it very clear that the minority drivers tend to be residents of my district, Lord knows what the kind of hings (sic) that are happening, they can't even get CETA jobs now. CETA closes March 31, so I don't know where to tell these guys to go except to try to bring the pressure to bear wherever we can to try to suggest to the owner that it would be wise for him tosit (sic) down with the union . . ., the parties and have it done, right?

BY MR. HAGGERTY:

As far as the finding goes.

BY MR. CUNNINGHAM:

O.K. Once you make the findings thn we will take the, then we've got to move on the arguments at the time.

BY MR. HAGGERTY:

That's correct. And the ordinance has to be published by the end of this month or by next Tuesday.

BY MR. CUNNINGHAM:

I understand. So simply. I'm going to vote no on the extension and Ican (sic) assure you that as soon as this dispute is resolved I will be the first one to bring in the findings, to bring the action in so that we an go forward.

BY MR. FERRARO:

• • • •

BY MR. YAROSLAVSKY:

Thank you Mr. President. Mr. Howery, could you tell me since the strike, how lng has the strike been going on now? About a month?

BY MR. HOWERY:

Since February 11.

BY MR. YAROSLAVSKY

And since that time have there been nough (sic) taxi cabs on the streets to pick up the slack that has been left by their lack of presence?

BY MR. HOWERY

We have not done a tudy (sic) on this, but we . . .

BY MR. YAROSLAVSKY

What is your professional opinion?

BY MR. HOWERY

We have not received complaints.

MY MR. YAROSLAVSKY

O.K. . . .

BY MR. HOWERY:

As to lck (sic) of service. Yellow Cab was running about 5,000 trips per day, about 60% of those were by phone or 3,000 per day, the other ompanies (sic) have indicated that their service level has increased substantially. Yellow is still getting about 2,000 calls per day onthe (sic) telephone even though they are not in business.

BY MR. YAROSLAVSKY

Mr. Howery isn't it your professional judgment that we had prior to the strike a glut of taxicabs on the streets of Los Angeles?

BY MR. HOWERY:

We believe that there were too many, I wouldn't label it a gut.

BY MR. YAROSLAVSKY

O.K. There were too many.

BY MR. HOWERY:

There were more than enough taxicabs on the street.

BY MR. YAROSLAVSKY

Mr. President, I ca (sic) report to you that my office which is the collector of all complaints from social security to Afganistan (sic) to taxicabs have not eceived (sic) very many calls on the Yellow Cab strike at all.

Our community has grown accoustomed (sic) to poor service in the past and w (sic) have not had any complaints this time around. Maybe they're getting better service from the independents, I don't know, or theother (sic) companies. What I'm driving at is this, if we were to cancel the franchise, or not extend this franchise, what would thepublic (sic) in Los Angeles be losing? Seems to me they wouldn't lose a damn thing, and in fact we might actually be creating a more healty (sic) marketplace in the taxicab industry because instead of having to sit around or try to get cab rides in all kinds of ways thathave (sic) been reported to you and to us, all kinds of unethical behavior that may not be taking place in the taxicab business becase (sic) there there (sic) are too many cabs, maybe that will come to an end and everybody will have enough business now to do their job an (sic) if we don't have that kind of a situation, then after a while we will be able to reissue or reopen the talks for a new franchie (sic) and Mr. Maday presumably could apply at that time if he so chose. But I'm not even looking at this and I resent the implicaion (sic) that the council, I can understand where that implication would come from, that the council is being used as a leverge (sic) against the Yellow Cab Company, by the same token, I can see why the Yellow Cab Company would want to seek to use the council's levrage (sic) against the Teamsters Union. What I'm looking at it from is the point of view that how is the public going to get the bes (sic) level of service, and I think the public is being better served with Yellow Cab off the streets. Now I, . . . that's why I'm inclined to nt (sic) to vote for Mrs. Russell's extension unless I hear some overriding compelling reasons, but, Mr. President I, there is just a ertain (sic) amount of intuition around here one in awhile that has to play a role if we didn't have good intuition, then we wouldnt (sic) be sitting here year after year, and my intuition tells me in this case that Yellow Cab Company has not made every effort

to egotiate (sic) on this point. I just believe that very strongly and I have good reason to believe beyond that even worse things, butI (sic) just don't like the attitude, I don't like what I hear that has been said, I don't like the negotiating posture, there are tw (sic) ways to skin a cat, one way is to be a total . . . and another is to try and find a middle ground with some common negotiatingpossitions (sic) and that does not seem to characterize that latter ideas, does not seem to characterize Yellow Cab in this case. An (sic) Mr. President, I remember your speech a few years ago, when you indicated that you would never want to see the city held ranso (sic) again or held hostage again by any one cab company, and I think first of all we are not being held hostage now, because we do ave (sic) other cab companies, by the same token I think we have a responsibility to do justice to those who would seek to hold us hotage (sic) if they could, and that is why my inclination is to vote with to vote against 14A and to withdraw their franchise.

BY MR. FERRARO:

Mr. Farrell.

BY MK. FARRELL:

Mr. President I like agree with what my college (sic) David Cunningham said on the whole issue, with one pint (sic) though. These fellows have had about 20 meetings or so, and they have not been able to come to resolution. I believe if t (sic) was going to be there for the resolution to come, it would have been. I would simply like to add that we not even consider coninuance (sic), I'd just like to as a no vote today.

BY MR. FERRARO:

The Chair will recognize Mr. Bernardi and then Mr.

UNKNOWN

Oh, Mr. Ferraro by Presidential fiat he has requested to be heard first,

UNKNOWN

And I know the power of the President.

UNKNOWN:

The Chair will rcognize (sic) Mr. Ferraro, our great president for. . .

BY MR. FERRARO:

Mrs. Picus, I would like permission to speak.

UNKNOWN:

Well, you don't mean Mrs. Picus' ermission today, you have mine.

BY MR. FERRARO:

O.K. Mr. President, Mr. Temporary President. Members of the council, this is a very touching situation and we all knw (sic) that this has been a problem and I think one of the advantages of being President is restructuring the committee, I took thisout (sic) of the Industry and Transportation Committee which is now interested in economic development and given to Mrs. Russell to Transportation.

UNKNOWN:

That's why they want to remove you as President.

BY MR. FERRARO:

So, but uh, as we Mr. Yaroslavsky recaled (sic), we had a very tough decision to make a few years ago. It was four years now that the Yellow Cab went bankrupt

and we were. How long were we idle before Mr. Maday came in. How long was that?

BY MR. JOHN HAGGERTY:

I think it was about three months.

BY MR. FERRARO:

t (sic) might have been longer than that, but anyway, Mr. Maday came in and bailed the city out, not only with his generosity, but with the aid and held of the union. The unions worked hard to find somebody to come in and to take this over and we had a lot ofpeople (sic) out of work, men and women, didn't have any pay, didn't have any benefits, there was backpay that they hadn't received, nd (sic) it was a very sad situation and because of that we expanded the other cab companies, we created the independent cab companies, and the city is in better shape now. We are not getting the calls because of this strike that we got when they went bankruptbecause (sic) there has been a the ability of other companies to take over the slack. I think it, I think we are in a real bind becase (sic) whatever we do, we have a deadline. If we don't have the ordinance on pending when it comes up if it comes up again before he (sic) end of the month it has to be a unanimous vote and there as to be 12 members here and that is not, the possibility is that on't (sic) happen, so there could be a period of time there wouldn't be a franchise. What would happen.

BY MR. JOHN HAGGERTY:

If the franchise were to lapse, it could not then at a later day automatically be . . .

BY MR. FERRARO:

We cannot automatically extend . . .

BY MR. JOHN HAGGERTY:

Well, it should automatically lapse then that franchise or franchise would have to be put back out to bid if the decision was made that a new franchise was desirable. I guess what I'm trying to say if the franchise were to lapse, that the present operator would not automatically be entitled to pick up that franchise as it comes through at at later date, and decide they wanted to allow for the renewal of that franchise.

BY MR. FERRARO:

Alright, that's the dilemma we find ourselves in and let me say that this condition has been pending for sometime, they there was a threatened strike before the holidays, and uh with the impact of the Mayor's Office, we were able to get the parties together and they continued to work and they extended it for 90 days or whatever it was and now we're back in the same problem and I find that it will be very difficult to get this ordinance past (sic) to extend this franchise if the labor dispute is not settled by the end of this week. And I think that both sides should realize that, that it appears that the Council is not going to extend this franchise today, and both sides should realize that it just uh, is not done by the end of this week, that there is a very good possibility that there will not be a franchise for Yellow Cab, it will lapse, it will be open to other companies and I just think that this kind of information should be put out in the open, so everybody understands it. If we don't do something by, we have to have fact finding or no fact finding, but a finding by Friday . . .

BY MR. HAGGERTY:

Friday is the latest.

BY MR. FERRARO:

And we have to approve the ordinance by the 31st.

BY MR. HAGGERTY:

It has to be published by the 31st.

BY MR. FERRARO:

It has to be published by the 31st, Monday is the 30th. Friday there is only 5 to 10 people here, we couldn't pass an ordinance by Friday if we, if it was unanimous on Friday, because there is only 10. Monday there will be 12 or more, so then Monday is the last day because if we pass it unanimously, send it to the Mayor's Office forthwith, we've got to get it signed. I'm just giving people a time table so that they understand what is before the council, what happens, so, I think that we could either not pass Mrs. Russell's Motion or continue this until Monday, one way or another that would be the last day we could operate to take action.

UNKNOWN:

Right on time Mr. President. That is, you've run out of time. Mr. Bernardi.

BY MR. BERNARDI:

Some questions raised about the operation has to do with the $6,500.00, the bankruptcy situation, and I think another item or two. Mr. Howry how are we involved in that?

BY MR. HOWRY:

Basically on the 60, so called $6,500.00, we consider that a legal matter, the Board in passing a rate increase last year indicated that it should be flowed through to the drivers until the end of the Teamsters drivers contract, which was October 10th or 13th, I forget which of those two dates.

BY MR. BERNARDI:

And it wasn't?

BY MR. HOWRY:

It was until that date and for some weeks after that, but subsequently apparently Mr. Mayday determined that the time had run and there was no contract so he ceased paying the fee that was supposed to end at the time and be negotated out in their new contract. The Transportation Commission subsequently took action saying that that flow-through should be continued but there is a legal question and dispute between the parties as to whether or not they had the authority to do that retroactively. To cover the time from the time it is originally terminated until the time that they took action asking that the flow-through be continued.

BY MR. BERNARDI:

The flow-through had been paid to the drivers up to what date?

BY MR. HOWRY:

Uh, I'm not . . . I, I believe uh, about the end of October.

BY MR. BERNARDI:

By the end of October. They've been working without a contract since the end of October?

BY MR. HOWRY:

They had contract extensions, but the date that allows the flow-through to th . . . there was . . .

BY MR. BERNARDI:

The contract was extended, wouldn't that automatically apply as well to the other conditins (sic)?

BY MR. HOWRY:

No sir, because that fee was based on the flow-through to the drivers was based on a specific date.

BY MR. BERNARDI:

Wasn't it also based on the specific permission to increase the cab fare?

BY MR. HOWRY:

Yes sir, but the intent of the Commission was that that would be renegotiated at the time of the contract termination.

BY MR. BERNARDI:

If the Commission didn't anticipate that there would be a strike.

BY MR. HOWRY:

No, sir, if the, if that had been anticipated it would have been made continuous so long as there was any kind of agreement between the parties.

BY MR. BERNARDI:

But the contract was continued, was extended, it was a question then of whose position you take as to whether that should have included the flow-through or not.

BY MR. HOWRY:

We don't believe that we should take a position we think that that's a legal matter as to the interpretation.

BY MR. BERNARDI:

What about the other . . .

BY MR. HOWRY:

. . . until it's resolved by negotiation.

BY MR. BERNARDI:

Wasn't there something else that was raised about abankruptcy (sic)?

BY MR. HOWRY:

That's something that Mr. Morris has indicated, that anattorney (sic), who had worked for Mr. Mayday had filed involuntary bankruptcy to collect from fees that he claimed he had not paid.

BY MR. BERNARDI:

Has the owner of the company been retaining what was supposed to be the flow-through since October, since the end of October? Apparently if the cab drivers haven't been getting it, then he's been retaining it.

BY MR. HOWRY:

It's been terminated when the uh. . .

BY MR. BERNARDI:

I understand, but if it didn't reduce the fares. We didn't reduce the fares when that terminated.

BY MR. HOWRY:

They haven't been operating from February 11th.

BY MR. BERNARDI:

Since October when the contracts expired, they haven't been paying the cab drivers that flow-through?

BY MR. HOWRY:

The Board took action sometime in November, I believe ordering that that flow-through be paid to the drivers. I believe that from that time forward it had been paid to them until they terminated. I think there was a gap in there.

BY MR. BERNARDI:

From October to November? Since November you say the cab drivers have been getting the flow-through?

BY MR. HOWRY:

It is my understanding that they have.

BY MR. BERNARDI:

Is it true or not true? May I ask them that question?

UNKNOWN:

It was reinstated during the two week period which involves $6,500.00 which the National Labor Relations Board found was the basis for a complaint issued by them because they did not continue to pay to the drivers as they were required to do under Federal law. And also the Labor Commissioner found that $500.00 was due.

BY MR. BERNARDI:

When did they pay it, just for a few weeks then?

UNKNOWN:

They continued it after the Board Commission ordered it, they did not restore the two weeks which they had taken out.

BY MR. BERNARDI:

So just two weeks, there is a gap of two weeks, they had been paying it up until the time that the work stoppage.

UNKNOWN:

That's right. The $6,500.00 they did not pay.

BY MR. BERNARDI:

I recall that that Mr. Ferraro pointed out, I believe when the first period before the City Council with strong support from the Teamsters that we granted them permission to put 100 was it 100 and how many cabs on the street.

BY MR. HOWRY:

I don't recall that history.

BY MR. BERNARDI:

Oh, there was a, Mr. Haggerty, therewas (sic) a limit on the number of cabs, was it 150?

BY MR. HOWRY:

They have 300 authorized at the time of the ceiling was eliminated.

BY MR. BERNARDI:

Well, I'm trying to, I think there were 3 different actions that the Council took.

BY MR. HAGGERTY:

I believe the actions were to the best of my recollection when the franchise was assigned for the bankrupt company pursuant to the bankruptcy proceedings to Mr. Mayday (sic), the maximum was 150, but the ordinance specifically provided by resolution that Council could increase . . .

BY MR. BERNARDI:

So it was 150. Subsequent that we increase it to what 300?

BY MR. HAGGERTY

To 300.

BY MR. BERNARDI:

And then another action was taken to remove any restrictions . . .

BY MR. HAGGERTY:

Thats (sic) correct . . .

BY MR. BERNARDI:

. . . and I think all through this didn't the independent cabs, weren't they concerned about what the impact this would have on their operation?

BY MR. HAGGERTY:

Well, I believe the action to remove all restrictions on Yellow Cab as to a maximum, in other words, the last action taken by the council was on condition that the Board likewise would remove any restrictions on the limits on the independent associations because they also had a . . .

BY MR. BERNARDI:

It was sweetened to that extent, was it? And the independent cabs, haven't they limited, I think they have limited to a number of members that they have. Is that correct?

BY MR. HAGGERTY:

Up to, I don't know what the present status is, but I know a few months ago that there was a self-imposed limit by the associations, I don't know actually what the present condition is now, maybe somebody can . . .

BY MR. BERNARDI:

Let, let, me say this, we've been, we're being excused and we will be excused I guess from, every angle if we continue this for another 30 days, we will be accused of being on the side of the, of the owner of Yellow Cab, if we refuse to continue, then we are accused of being on the side of the cab drivers. I don't know how having them stay out of work would be on their side, they are going to be out of a job. But, I, I, think this really is a position we've got to take and uh, would be to remain neutral. We have until when the 30th? We . . . 12 votes you can adopt. . .

BY MR. HAGGERTY:

No, not in the case of granting a franchise. There is no ordinance, the charter specifically prohibits . . .

BY MR. BERNARDI:

Alright so when is the date? Is Monday the last day?

BY MR. HAGGERTY:

Well, it has to be published on Tuesday and the question of whether or not the council could act on Tuesday, the Mayor sign, and then get published on Tuseday, I don't know.

BY MR. BERNARDI:

If the council were to act on Tuesday and published on Tuesday, forthwith to the Mayor, then it would be, there would still be time.

BY MR. HAGGERTY:

The finding has to be made by Friday at the latest.

BY MR. BERNARDI:

I, I'm going to vote to remain neutral so I'm going to have to vote against Mrs. Russell's extension.

BY MR. EUGENE MADAY

Mr. Bernardi, I'd like to answer your question in regards to the flow-through situation if I may please?

BY MR. FERRARO:

Mr. Barnardi, . . . alright, go ahead Mr. Mayday (sic).

BY MR. MADAY:

What happened with the flow-through at the request of the Teamsters, the city granted the drivers two different flow-throughs; one flow-through ran out approximately October 31; and the other one continued. When I say run out, by ordinance the flow-through was supposed to go in October 31st. We were in doubt as to how to handle it, we contacted the Transportation Department, they say "as of this date you cease paying the first flow-through but you must continue to pay the second". So we ceased paying the first flow-through and we gave the drivers 50% of the commission instead, we figured in them both. Consequently, a few weeks later another ordinance was adopted reinstating the flow-through so you had a period of approximately two or three weeks where the one flow-through had run out, and then it was reinstated two or three weeks later and this is where the confusion came in on the flow-through. And since then they have been getting all the flow-throughs and during that period of time they got 50% commission on that amount.

BY MR. FERRARO

Alright, Mr. Braudie.

BY COUNSELMAN BRAUDIE:

(Unintelligable) the entire matter.

BY MR. FERRARO:

Alright, is there anyone else who wants to speak, before Mrs. Russell closes? Alright Mrs. Russell, to close.

BY COUNSELWOMAN RUSSELL:

Mr. President, members, I appreciate . . . I want to sum up saying I did bring in the Motion today because I wanted to give the council the choice since Mr. Ferraro so graciously (unintelligible)) and the Transportation Committee. I have tried to give the council a choices as we've gone on some of these tough decisions.

The uh, so that really is the reason to have that Motion before you today. Mr. Bernardi indicated he wanted to be neutral. I think that we would like to neutral in terms of the labor disputes and with any efforts to give us some more ties for study and reports in the Department and discussions. Unfortunately, it like Heisenberg's principle there are times when you simply by observing, you do effect events, and I think that is the case on this one, and that we will not be seen to be neutral even if those are our motivations. As has been indicated at the center table and by Mr. Ferraro's comments, we are really in a very sharp time bind and we could indeed take an action on the ordinance on Monday if there was 12 unanimous votes, but we could not, it would be meaningless to do that unless we made the findings on Friday. And the time bind really has been the march of events on the council. I am not unhappy with the comments that have been made in the views that they would vote against my Motion, as I say I wanted to do a fair procedure. I really do appreciate the tenor of the comments of the council because they have not been in terms of choosing up sides, but in terms of what would be the best public service. So along that line again, I want to reiterate to the members of council I will have a Motion tomorrow which will instruct the Department to study then impact and report back to us. Some of the comments that have been made by the members and indicated the number of cabs on the street and we have all watched that, what the impact is. There has not been an outcry because of the lack of service during the strike and we are looking at numbers, it could be that in negotiating a new franchise that the numbers could be changed and could be better in terms of public service. The existing franchise doesn't pick up again, Mr. Mayday (sic) could bid in again or somebody else could change the numbers. There really are a lot a choices that can be made and I think we want to make these choices on the basis of the factual information we will get from

the department and on the basis of being as neutral aswe (sic) can in terms of the impact on the parties, so I will vote for my Motion which I brought for procedural means, and hope that we will be able to follow good procedures in the future.

BY MR. FERRARO:

We have 14A before us. Prepare the roll. Tabulate the vote.

BY THE SECRETARY OF THE COUNSIL (sic):

2 ayes, 2 nos, uh, excuse me, 2 ayes, 10 yeses (uninteligable)

BY MR. FERRARO:

Alright, that Motion failed to pass, I can assure you that. The next item. Well, I think 14A was a substitute for 14, Mrs. Russell. It was just to notify that it was on the agenda. Mr. Gibson.

BY MR. GIBSON:

My vote was no on that, I don't know. . .

BY MR. FERRARO:

Alright let the record be corrected. Next item.

UNKNOWN:

Mr. President the following additional matters are on the dais.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EXHIBIT A TO DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER

CITY OF LOS ANGELES ORDINANCE NO. 146,496

An Ordinance granting YELLOW CAB COMPANY OF CALIFORNIA a taxicab franchise upon certain streets in the City of Los Angeles whereas the following facts appear.

The City of Los Angeles has heretofore granted by ordinance a taxicab franchise in the City of Los Angeles to the YELLOW CAB COMPANY OF CALIFORNIA.

The Board of Public Utilities and Transportation, pursuant to Subsection (8) of Section 3 of the Charter of the City of Los Angeles, has recommended that the City grant to the holder of such franchise a new franchise to replace such franchise heretofore granted, and no reason appears why such new franchise should not be granted; NOW, THEREFORE,

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS:

DRAFT OF FRANCHISE RENEWALS

DEFINITIONS

Sec. 1. Unless it is apparent from the context that it has a different meaning, each of the following words and phrases has the meaning herein stated whenever it is used in this franchise, that is:

Board: The Board of Public Utilities and Transportation of the City.

City: City of Los Angeles, State of California, in its governmental capacity.

Franchise Property: All property installed, used or maintained in or upon the public streets pursuant to any right or privilege granted by this franchise.

Grantee: The person, firm, or corporation to whom this franchise is awarded and granted by the City Council and any person, firm, or corporation to which it may hereafter be lawfully transferred as herein provided.

Street: The portion of any public street, road, highway, freeway, lane, alley, court, sidewalk, parkway, or public place which now exists or which may hereafter exist within the City.

Taxicab: Any motor vehicle equipped with a taximeter, operated in streets of this City by or for the Grantee for the transportation of persons for hire at the direction of the passengers and not over a defined route.

Taximeter: An instrument for indicating and recording charges for taxicab services in proportion to distance traveled, waiting time, or both.

Taxicab Zone: The portion of a street area designated for the standing of taxicabs while awaiting employment.

FRANCHISE GRANT

Sec. 2.1. NATURE AND EXTENT OF GRANT

The franchise hereby granted by the City authorizes the Yellow Cab Company of California subject to the provisions herein contained, to conduct a public transportation business by taxicab, in the City, that is, a franchise to pick up persons by taxicab in any street within the franchise area herein described and to transport such persons, for hire, over any street within the City and to stand taxicabs at designated taxicab zones within said franchise area.

Sec. 2.2 DURATION OF GRANT

This franchise shall be effective on the thirty-first (31) day after the publication of the enacting ordinance, provided the Grantee has filed with the Board, within twenty (20) days after such date of publication, a written instrument, addressed to the Council accepting this franchise and agreeing to comply with all of the provisions hereof.

This franchise shall expire October 29, 1980, unless sooner terminated by ordinance, in the event, (a) the Council finds that the Grantee has failed to comply with any material provision hereof; (b) any provision hereof becomes invalid or unenforceable and the Council expressly finds that such provision constituted a consideration material to the grant of his franchise.

The right of the City to revoke or terminate this franchise pursuant to the terms of this Section shall be in addition to all other rights and remedies which may otherwise accrue to the City by reason of any failure or refusal by the Grantee to perform any obligation imposed by the terms of this franchise.

Sec. 2.3 DESCRIPTION OF FRANCHISE AREA

The franchise area referred to in Sec. 2.1 hereof is the area of the City described as follows:

(a) Primary Service Area as described in Sec. 2.4 hereof. The Los Angeles International Airport subject to the provisions of this franchise and to any additional conditions that may be prescribed by the Board of Airport Commissioners.

(b) The City to its boundaries or any portion thereof, except areas defined in (a) herein, for pick up on a telephone order or a referred order subject to the provisions of this franchise and to any additional conditions that may be prescribed by the Board.

The City boundaries referred to are as existing at the date of the award of this franchise, according to the official records of the City Engineer.

Sec. 2.4 DESCRIPTION OF PRIMARY SERVICE AREA

The Primary Service Area is the area of the City described as follows:

All of the area of the City lying between the southerly line of Alondra Boulevard on the south and a line on the north described as follows:

Beginning at a point on the westerly boundary of the City at its intersection with the common boundary of the San Fernando and Westgate Annexations; thence, easterly along said common boundary and northerly line of Mulholland Drive to the Hollywood Freeway, northerly along the Hollywood Freeway to a point due south of the southernmost tip of Universal City, due north to the City boundary at Universal City, northeasterly along this boundary and the common boundaries of the City of Los Angeles and the Cities of Burbank, Glendale, Pasadena, and South Pasadena.

The streets referred to in this Section are as existing on the effective date of this franchise, according to the official records of the City Engineer.

CONSTRUCTION OF FRANCHISE

Sec. 3.1 INTERPRETATION

Unless otherwise specifically prescribed herein the following provisions shall govern the interpretation and construction of this franchise:

(a) The singular number includes the plural, and the plural number includes the singular.

(b) Time is of the essence of this franchise. The Grantee shall not be relieved of its obligation to promptly comply with any provision hereof by any failure of the City to enforce prompt compliance with the same, or any other provisions.

(c) Any right or power conferred, or duty imposed upon any officer, employee, department, or board of the City, is subject to transfer by operation of law to any other officer, employee, department or board of the City.

(d) The Grantee shall have no recourse whatsoever against the City for any loss, cost, expense, or damage, arising out of any provision or requirement of this franchise, or the enforcement thereof.

(e) This franchise does not relieve the Grantee of any requirement of the City Charter or any ordinance, rule, regulation or specification of the City.

(f) This franchise shall not constitute any exclusive grant of any right to carry persons or property for hire within the City or any portion thereof.

Sec. 3.2 LIMITATIONS UPON GRANT

(a) No privilege or exemption is granted or conferred by this franchise except those specifically prescribed herein.

(b) Grantee shall not permit any right or privilege granted by this franchise to be exercised by another, nor shall this franchise or any interest therein or any right or privilege thereunder be in whole or in part sold, transferred, leased, assigned, or disposed of, either by merger or consolidation, or otherwise, without the consent of the City expressed by ordinance; provided, however, that the provisions of this franchise shall not require any such consent and no consent shall be required for any transfer by Grantee in trust or by way of mortgage or hypothecation covering all or any part of Grantee's property, which transfer, mortgage or hypothecation shall be for the purpose of securing an indebtedness of Grantee or for the purpose of renewing, extending, refunding, retiring, paying or cancelling in whole or in part any such indebtedness at any time or from time to time. Any consent of the City hereunder shall be subject to such terms and conditions as may be recommended by the Board unless otherwise determined by the City Council in the manner provided in Ordinance No. 58,200, as amended, with respect to grants of franchise. Any such sale, lease, assignment or other disposition of franchise for which consent of the City is required hereunder shall be evidence by a duly executed instrument in writing addressed to the City Council and filed with the Board.

(c) Grantee shall not install, construct, or maintain any property in the public streets or public place within the franchise area unless in each instance the Board shall first determine that such property is reasonably necessary to the conduct of the taxicab business authorized by this franchise.

Sec. 3.3 RIGHTS RESERVED TO CITY

(a) There is hereby reserved to the City every right and power which is required to be herein reserved or provided by any provision of the City Charter or Ordinance No. 58,200 as amended, and the Grantee by its acceptance of this franchise agrees to be bound thereby and to comply with any action or requirement of the City in its exercise of any such rights or power.

(b) Neither the granting of this franchise nor any provision hereof shall constitute a waiver or bar to the exercise of any governmental right or power of the City.

OPERATIONS AND SERVICES

Sec. 4.1 ESTABLISHMENT AND ABANDONMENT OF SERVICE

When the Grantee shall have been authorized by this franchise to furnish transportation services, such transportation service shall be provided by the operation of a fleet of taxicabs consisting of at least 300 vehicles and such minimum service shall be in force within 180 days from the effective date of this franchise or unless an extension is granted by the Board after public hearing.

After the Grantee shall have established any transportation service pursuant to this franchise such service shall not be suspended or abandoned unless such suspension or abondonment be authorized or ordered by the Board.

The Grantee shall not refuse to accept any passenger in the Primary Service Area or Los Angeles International Airport for transportation, for hire, by taxicab to any destination to and at which the Grantee may legally transport and discharge such passenger, unless the attitude or condition of the passenger is such that it would not be in the public interest for the Grantee to accept such passenger.

Whenever the Grantee shall file with the Board a written application alleging that public convenience and necessity no longer require that the Grantee furnish transportation service as authorized or required by, or pursuant to, this franchise, in any part or all of the franchise area, the Board shall, at a public hearing take evidence upon that question and shall make a finding with respect thereto. Notice of such hearing shall be given for a period of fifteen (15) days prior thereto, by posting such notice in each of the taxicabs in service in the area affected; such notices, in a form satisfactory to the Board, to be posted by the Grantee. If the Board shall

find that public convenience and necessity no longer require that the Grantee furnish such transportation service, then the Board may, after hearing as provided herein, authorize suspension or abandonment of such service upon such reasonable terms and conditions as may be prescribed by the Board.

Sec. 4.2 OPERATIONS OF GRANTEE

All vehicles, equipment and appurtenances used under this franchise shall be operated and maintained in accordance with the laws of the State of California, ordinances of this City and orders of the Board.

All taxicabs used by the Grantee within the City shall be operated under and pursuant to the provisions of this franchise and not otherwise.

The number of taxicabs operated pursuant to this franchise; the manner and time of all operations, the transportation service provided, and the rates or fares charged shall at all times conform to such regulations as shall from time to time be fixed or prescribed by the City and/or Board.

The Board may require the franchise Grantee to establish an appropriate order referral interconnect, telephone loop with other franchise Grantees.

Sec. 4.3 PUBLIC LIABILITY INSURANCE OR BOND

Grantee must at all times fully comply with all insurance or bond requirements as set forth in Section 71.13 of the City Municipal Code.

COMPENSATION AND GUARANTEE TO CITY

Sec. 5.1 PAYMENTS TO CITY

By its acceptance of this franchise, the Grantee agrees to pay to the City, quarter annually, (a) Five dollars

($5.00) for each taxicab used for the transportation of persons for hire in any street within the franchise area at any time during such quarter annual, payment period, and (b) a percentage of the total gross receipts of the Grantee, as herein specified, from transportation of persons or from any other operations under this franchise.

The percentage to be used under (b) above shall be determined by adding the appropriate Payment Percentage Increments shown in Schedules I and II, to 1.00%. The Payment Percentage Increments applied to the total gross receipts shall be calculated from the sum of the following schedule based on the Grantee's level of service. The level of service shall be measured by the percent of calls answered within 45 seconds and the percent of telephone orders responded to within 15 minutes within the Primary Service Area.

SCHEDULE I

TELEPHONE ANSWERING TIME

Percent of Calls for Service Answered Within 45 Seconds	Payment Percentage Increment
More than 85%	0%
85% to more than 80%	0.1%
80% to more than 75%	0.2%
75% and below	0.3%

SCHEDULE II

TELEPHONE ORDER RESPONSE TIME

Percent of Orders Responded to Within 15 Minutes *	Payment Percentage Increment
More than 76%	0%
76% to more than 73%	0.1%
73% to more than 70%	0.3%
70% and below	0.7%

* Applies to orders responded to within Primary Service Area only.

The level of service shall be determined by the Board of Public Utilities and Transportation based on the results of service tests conducted by the Department of Public Utilities and Transportation and presented at a public hearing.

Service tests shall consist of a series of not less than one hundred tests over the seven days of the week for each of the two factors used to determine the percentage. The testing as defined herein shall be conducted at least once each year. A test shall consist of a telephone request for service to be provided from specific location and at a specific time within the Primary Service Area.

Telephone answering time shall be measured from the time the call is placed until it is answered by grantee. Response time shall be measured from the time the order is accepted by Grantee until a cab arrives at the requested location. Each service test call location, time of day and day of week shall be selected at random from the actual tripe operated in the Primary Service Area by Grantee during the preceding six month period.

The percentage used in calculating the quarterly annual payments shall be determined by the Board after public hearing and shall apply to the gross receipts for the period of operation during which the determination is made and each succeeding period thereafter until the Board establishes a new percentage.

The amount of any payment based on gross receipts in excess of 1% of gross receipts shall not be allowed as franchise payment expense for rate making purposes.

For the purpose of determining the amount of quarter annual payments to be made, the full cash value of any consideration reserved by the Grantee in a form other than cash shall be included in the gross receipts. Receipts from the sale of script, tickets, and passes, and from all contracts by the terms of which the Grantee agrees to furnish transportation shall be deemed to be

receipts arising from the transportation of persons; whether or not such transportation be actually furnished.

Checks for all such payments shall be made payable to the City Treasurer, shall be submitted to the Board within thirty (30) days after the payment period, and shall be accompanied by a statement in duplicate, verified by the oath of the Grantee or by a responsible general officer of the Grantee showing in such form as shall be prescribed from time to time, by the Board, the facts material to a determination of the amount due, including a list of all taxicabs owned or under the control of, the Grantee at anytime during the payment period.

The payment made to the City pursuant to this Section or any period shall be in lieu of any license fee or business tax now or hereafter prescribed by the City Municipal Code for taxicabs operated pursuant to this franchise during said period.

The use of the service test and its results to determine franchise payment shall not preclude in any way the Board's use of the same service test results or any other test, investigation or study in determining Board actions regarding its power to regulate raises and services.

Sec. 5.2 FAITHFUL PERFORMANCE BOND

Within five (5) days after the award of this franchise the Grantee shall file with the Board an acceptable corporate surety bond in duplicate, effective for the entire term of the franchise, running to the City in the penal sum of Sixty Thousand Dollars ($60,000) to be approved by the City Council, conditioned that the Grantee shall well and truly observe, fulfill and perform each and every term and condition of this franchise except the obligations imposed on the Grantee in Section 4.3 of this franchise, and that:

(a) If the Grantee shall fail to observe, fulfill and perform any term or condition fixed or prescribed by or

pursuant to Sections 5.1 or 5.3 of this franchise, then any damage to the City caused by such failure shall be recoverable jointly and severally from the principal and sureties named in such bond; and

(b) If the Grantee shall fail to observe, fulfill and perform any term or condition fixed or prescribed by, or pursuant to, any Section of this franchise, then the whole amount of the penal sum named in such bond shall be taken and deemed to be receivable jointly and severally from the principal and sureties named in such bond.

If, at anytime during the term of this franchise, the condition of the corporate surety shall change in such manner as to render the bond unsatisfactory to the City the Grantee shall replace such bond by a bond of like amount and similarly conditioned, issued by a corporate surety satisfactory to the City.

In the event the Grantee's obligations under this franchise shall so warrant, the Board, from time to time, may authorize or require appropriate adjustments in the amount of the Bond.

Sec. 5.3 INDEMNIFICATION TO CITY

The Grantee shall keep and hold the City, its officers and employees, free and harmless from any and all claims, costs, liability, damages or expenses (including costs of suit and fees and expenses for legal services on account of any damages, claimed by any third party, including such claims by agents or employees of the City or of the Grantee, to have been sustained in or about any taxicab zone established or maintained by or for the Grantee, or in or about any of the Grantee's premises, or arising out of the Grantee's operations, as a result of anything claimed to have been done or omitted to be done by the Grantee or by anyone claiming or acting under it.

Sec. 5.4 INSPECTION OF PROPERTY AND RECORDS

At all reasonable times, the Grantee shall permit any duly authorized officer or employee in the classified service of the City to examine all property of the Grantee, whether such property be situated within or without the City, and to examine and transcribe any and all books, accounts, papers, maps and other records kept or maintained by the Grantee or under its control which treat of the operations, affairs, transactions, property or financial condition of the Grantee, including those which treat of the operations and property of the Grantee outside the City. If any of the books, accounts, papers, maps or other records referred to in this Section are kept outside the City and if the Board shall determine that an examination thereof is necessary or appropriate to the performance of any of its duties, then all travel and maintenance expense necessarily incurred in making such examination shall be paid by the Grantee.

The Grantee shall prepare and furnish to the Board at the times and in the form prescribed by the Board, such reports, with respect to his operations, affairs, transactions, property or financial condition, as may be reasonably necessary or appropriate to the performance of any of the duties of the Board.

A copy of every application, petition, and schedule, and all amendments thereof, concerning rates and service within the City filed by the Grantee with any regulatory agency of the State of California, shall within one day thereafter, be filed with the Board.

Sec. 1. The City Clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was passed by the Council of the City of Los Angeles, at its meeting of August 28, 1974.

REX E. LAYTON
City Clerk.

By M. B. Wilson, Deputy

Approved September 5, 1974.

JOHN S. GIBSON, JR.
Acting Mayor

File No. 74-1222

(J91979) Sept. 26 it

EXHIBIT B

CITY OF LOS ANGELES ORDINANCE NO. 149,825

ORDINANCE NO. 149825

An ordinance consenting to the assignment by Yellow Cab Company of California of the franchise granted by ordinance and amendments herein prescribed.

WHEREAS, by Ordinance No. 146,496, approved September 5, 1974, the City of Los Angeles granted to Yellow Cab Company of California a taxicab franchise providing service to Master Plan Primary Areas B (West Los Angeles), C (Central), and D (South Central) in the City of Los Angeles, and

WHEREAS, the assets of Yellow Cab Company of California have been purchased by Golden State Transit Corporation, a California corporation, dba Los Angeles Yellow Cab, and

WHEREAS, application has been made to the City of Los Angeles for its consent to the assignment and transfer of the franchise granted by Ordinance No. 146,496 to Golden State Transit Corporation, a California corporation, dba Los Angeles Yellow Cab, and no reason appears why such consent should not be given upon the terms and conditions stated herein.

NOW, THEREFORE,

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS:

Section 1. Section 2.3 of Ordinance No. 146,496 is amended to read as follows:

Sec. 2.3 DESCRIPTION OF FRANCHISE AREAS

The franchise areas referred to in Section 2.1 hereof are the areas of the City described as follows:

(a) Primary Service Areas B, C and D, as described in Section 2.4 hereof. The Los Angeles International Airport subject to the provisions of this franchise and to any additional conditions that may be prescribed by the Board of Airport Commissioners.

(b) The City to its boundaries or any portion thereof, except areas defined in (a) herein, for pick up on a telephone order or a referred order subject to the provisions of this franchise and to any additional conditions that may be prescribed by the Board.

City boundaries referred to are as existing at the date of the award of this franchise, according to the official records of the City Engineer.

Section 2. Section 2.4 of Ordinance No. 146,496 is amended to read as follows:

Sec. 2.4 DESCRIPTION OF PRIMARY SERVICE AREAS

The Primary Service Area B is the area of the City described as follows:

Beginning at a point on the westerly boundary of the City at its intersection with the common boundary of the San Fernando and Westgate Annexations, thence easterly along said common boundary to Mulholland Drive, easterly along the northerly line of Mulholland Drive to easterly line of Bowmont Drive, southerly along Bowmont Drive to the City boundary, southerly and westerly along the City boundary to the easterly line of La Cienega Boulevard near Olympic Boulevard, southerly along La Cienega Boulevard to the Santa Monica Freeway, easterly along the Santa Monica Freeway to the southerly line of Washington Boulevard, southwesterly along Washington Boulevard to the City boundary, southwesterly along the City boundary to the easterly line of Overhill Drive near 63rd Street, southerly along Overhill Drive to the City boundary, westerly and southerly along the City boundary to the Pacific Ocean, northwesterly along the shoreline to

the City boundary west of Castellamare, and northerly along the City boundary to the point of beginning.

The Primary Service Area C is the area of the City described as follows:

Beginning at the intersection of the northerly line of Mulholland Drive with the westerly line of Bowmont Drive; easterly along Mulholland Drive to the Hollywood Freeway, northerly along the Hollywood Freeway to a point due south of the southermost tip of Universal City, due north to the City Boundary at Universal City, northeasterly along the City boundary to the Los Angeles River near 25th Street, northerly along the Los Angeles River to the Santa Monica Freeway, westerly along the Santa Monica Freeway to the westerly line of La Cienega Boulevard, northerly along La Cienega Boulevard to the City boundary near Olympic Boulevard, northeasterly along the City boundary to the westerly line of Bowmont Drive, and northerly along Bowmont Drive to the point of beginning.

The Primary Service Area D is the area of the City described as follows:

Beginning at a point on the common boundary of the cities of Los Angeles and Culver City at its intersection with the northerly line of Washington Boulevard; thence northeasterly along Washington Boulevard to the Santa Monica Freeway, easterly along the Santa Monica Freeway to the Los Angeles River, southerly along the Los Angeles River to the City boundary near 25th Street, westerly and southerly along the City boundary to the southerly line of Alondra Boulevard, westerly along Alondra Boulevard to the City boundary, northerly and westerly along the City boundary to the westerly line of Overhill Drive near 63rd Street, northerly along Overhill Drive to the City boundary, and easterly and northerly along the City boundary to the point of beginning.

The streets referred to in this Section are as existing on the effective date of this franchise, according to the official records of the City Engineers.

Section 3. The first paragraph of Section 4.1 of Ordinance No. 146,496 is amended to read as follows:

Sec. 4.1 ESTABLISHMENT AND ABANDONMENT OF SERVICE

When the Grantee shall have been authorized by this franchise to furnish transportation service, such transportation service shall be provided by the operation of a fleet of taxicabs consisting of at least 150 vehicles and such minimum service shall be in force within 180 days from the effective date of this franchise or unless an extension is granted by the Board after public hearing, provided however that the maximum number of taxicabs to be operated shall not exceed 150 taxicabs until such time as the Council, by resolution, modifies or deletes this maximum limitation, or, maintains it, upon report to it by the Board to be submitted no later than immediately following the first Board meeting in February, 1978.

Section 4. Section 4.3 of Ordinance No. 146,496 is amended to read as follows:

Sec. 4.3 PUBLIC LIABILITY INSURANCE OR BOND

Grantee must at all times fully comply with all insurance or bond requirements as set forth in Section 71.14 of the City Municipal Code.

Section 5. Section 5.1 of Ordinance No. 146,496 is amended to read as follows:

Sec. 5.1 PAYMENTS TO CITY

By its acceptance of this franchise, the Grantee agrees to pay to the City, quarter annually, (a) Five dollars ($5.00) for each taxicab used for the transportation of persons for hire in any street within the franchise area at any time during such quarter annual payment period, and (b) a percentage of the total gross receipts of the grantee, as herein specified, from transportation of persons, or from any other operations under this franchise.

The percentage to be used under (b) above shall be determined by adding the appropriate payment percentage increments shown in Schedule I and II to 1.00%. The payment percentage for each of the Primary Service Areas shall be calculated separately. The payment percentage increment to be applied to the total gross receipts shall be the sum of the percentages determined from the following Schedules based on the Grantee's level of service for that Primary Service Area which results in the highest percentage.

The level of service shall be measured by the percent of calls answered within 45 seconds and the percent of telephone orders responded to within 15 minutes within the Primary Service Area.

SCHEDULE I

TELEPHONE ANSWERING TIME

Percent of Calls for Service Answered Within 45 Seconds	Payment Percentage Increment
More than 85%	0%
85% to more than 80%	0.1%
80% to more than 75%	0.2%
75% and below	0.3%

SCHEDULE II

TELEPHONE ORDER RESPONSE TIME

Percent of Orders Responded to Within 15 Minutes *	Payment Percentage Increment
More than 76%	0%
76% to more than 73%	0.1%
73% to more than 70%	0.3%
70% and below	0.7%

* Applies to orders responded to within Primary Service Area only.

The level of service shall be determined by the Board of Public Utilities and Transportation based on the results of service tests conducted by the Department of Public Utilities and Transportatation and presented at a public hearing.

Service tests shall consist of a series of not less than one hundred tests over the seven days of the week for each of the two factors used to determine the percentage. The testing as defined herein shall be conducted at least once each year. A test shall consist of a telephone request for service to be provided from a specific location and at a specific time within the Primary Service Area.

Telephone answering time shall be measured from the time the call is placed until it is answered by grantee. Response time shall be measured from the time the order is accepted by grantee until a cab arrives at the requested location.

The percentage used in calculating the quarterly annual payments shall be determined by the Board after public hearing and shall apply to the gross receipts for the period of operation during which the determination is made and each succeeding period thereafter until the Board establishes a new percentage.

The amount of any payment based on gross receipts in excess of 1% of gross receipts shall not be allowed as franchise payment expense for rate making purposes.

For the purpose of determining the amount of quarterly annual payments to be made, the full cash value of any consideration received by the Grantee in a form other than cash shall be included in the gross receipts. Receipts from the sale of scrip, tickets and passes and from all contracts by the terms of which the grantee agrees to furnish transportation shall be deemed to be receipts arising from the transportation of persons and goods, whether or not such transportation be actually furnished.

Checks for all such payments shall be made payable to the City Treasurer, shall be submitted to the Board within thirty (30) days after the payment period, and shall be accompanied by a statement in duplicate, verified by the oath of the Grantee or by a responsible general officer of the Grantee, showing in such form as shall be prescribed from time to time by the Board, the facts material to a determination of the amount due, including a list of all taxicabs owned or under the control of the Grantee at any time during the payment period.

The payment made to the City pursuant to this Section for any period shall be in lieu of any license fee or business tax now or hereafter prescribed by the City Municipal Code for taxicabs operated pursuant to this franchise during said period.

The use of the service test and its results to determine franchise payment shall not preclude in any way the Board's use of the same service test results or any other test, investigation or study in determining Board actions regarding its power to regulate rates and services.

Section 6. Except as hereinabove amended, all the terms and conditions of Ordinance No. 146,496 shall remain in full force and effect.

Section 7. The City of Los Angeles hereby consents to the assignment and transfer by Yellow Cab Company of California to Golden State Transit Corporation, a California corporation dbo Los Angeles Yellow Cab, of the franchise granted by Los Angeles Ordinance No. 146,496 as recommended herein subject to the terms and conditions of this Ordinance of Consent.

Section 8. The consent of the City of Los Angeles to such assignment is subject to the filing by Golden State Transit Corporation, a California corporation dba Los Angeles Yellow Cab, with the Board of Public Utilities and Transportation at least ten (10) days prior to the effective date of the Ordinance of Consent, in a form

satisfactory to said Board and to the City Attorney, a letter of acceptance of Franchise Ordinance No. 146,496, as herein amended, and of this Ordinance of Consent, a Corporate Surety Bond in duplicate, guaranteeing faithful performance of Franchise Ordinance No. 146,496, in the amount of Sixty Thousand Dollars ($60,000), and evidence of satisfactory Public Liability insurance.

Sec. 9. The City Clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was passed by the Council of the City of Los Angeles, at its meeting of June 16, 1977.

REX E. LAYTON,
City Clerk,

By Chauncey B. Pruner, Deputy.

Approved June 17, 1977

TOM BRADLEY,
Mayor.

File No. 77-1771, 74-1222 S-8

Ordinance originally published on June 22, 1977; republished to correct clerical error.

(J83050A) Jun 27

EXHIBIT C

CITY OF LOS ANGELES ORDINANCE NO. 154,409

An Ordinance amending Ordinance No. 146,496, so as to extend the term of the taxicab franchise granted, through assignment to Golden State Transit Corporation to provide taxi service in areas B, C and D (Western, Eastern and South Central Los Angeles) of the City.

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS:

Section 1. Section 2.2 of Ordinance No. 146,496 is hereby amended by deleting "October 29, 1980" and inserting therein "December 31, 1980."

Sec. 2. All other terms and conditions of Ordinance No. 146,496, as assigned, shall remain in effect.

Sec. 3. The City Clerk shall certify to the passage of this ordinance and shall cause the same to be published once in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was pased by the Council of the City of Los Angeles, at its meeting of September 17, 1980.

REX E. LAYTON,
City Clerk

By Edward W. Ashdown, Deputy
Approved September 18, 1980
TOM BRADLEY,
Mayor

File No. 80-1485

(JD15043) Sept 23

CITY OF LOS ANGELES ORDINANCE NO. 154,713

An Ordinance amending Ordinance No. 146,496, as amended, so as to extend the term of the taxicab franchise granted, through assignment, to Golden State Transit Corporation to provide taxi service in Areas B, C and D (Western, Eastern and South Central Los Angeles) of the City of Los Angeles.

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS:

Section 1. Section 2.2 of Ordinance No. 146,496, as amended, is hereby amended by deleting "December 31, 1980" and inserting therein "March 31, 1981."

Sec. 2 All other terms and conditions of Ordinance No. 146,496 shall remain in effect.

Sec. 3. The City Clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was passed by the Council of the City of Los Angeles, at its meeting of Nov. 19, 1980.

REX E. LAYTON, City Clerk,

By /s/ Edward W. Ashdown, Deputy.

Approved Nov. 24, 1980

/s/ Tom Bradley, Mayor.

File No. 80-1485

(JD22072) Nov 27

CITY OF LOS ANGELES ORDINANCE NO. 154,931

An Ordinance amending Ordinance No. 146,496, as amended, so as to extend the term of the taxicab franchise of Golden State Transit Corporation dba Yellow Cab Company to operate taxicabs upon certain streets in the City of Los Angeles.

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS:

Section 1. Section 2.2 of Ordinance 146,496, as amended, is hereby amended to read:

SEC. 2.2 DURATION OF GRANT

(a) This franchise shall be effective on the thirty-first (31) day after the publication of the enacting ordinance, provided the Grantee has filed with the Board, within twenty (20) days after the date of publication, a written instrument, addressed to the Council, accepting this franchise and agreeing to comply with all of the provisions hereof, and provided further that the Council, prior to the thirty-first (31) day after the above-referenced publication, has made a finding that it is in the best interest of the City to allow for such extension of the franchise.

(b) This franchise, provided it becomes effective by the occurrence of the two conditions precedent and referred to in subsection (a) above, shall expire April 30, 1981, unless sooner terminated by ordinance, in the event (i) the Council finds that the Grantee has failed to comply with or violated any provision hereof, (ii) any provision hereof becomes invalid or unenforceable and the Council expressly finds that such provision constituted a consideration material to the grant of this franchise.

(c) The right of the City to revoke or terminate this franchise pursuant to the terms of this Section shall be in addition to all other rights and remedies which may otherwise accrue to the City by reason of any fail-

ure or refusal of the Grantee to perform any obligation imposed by the terms of this franchise.

Section 2. All other terms and conditions of Ordinance No. 146,496 shall remain in effect.

Sec. 3. The City Clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was passed by the Council of the City of Los Angeles, at its meeting of February 17, 1981.

REX E. LAYTON,
City Clerk

By Edward W. Ashdown, Deputy.

Approved February 19, 1981

TOM BRADLEY,
Mayor.

File No. 80-1485

(DJG732) Feb 27

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 81-1519 AAH

GOLDEN STATE TRANSIT CORPORATION,
a California corporation, doing business as
Yellow Cab of Los Angeles,
Plaintiff,

vs.

CITY OF LOS ANGELES, a municipal corporation,
Defendant.

PRELIMINARY INJUNCTION ORDED

Plaintiff's application for Preliminary Injunction came on for hearing on April 13, 1981, Michael R. Mitchell and John B. Rice appearing for plaintiff and Burt Pines, City Attorney appearing through his deputy for defendant. After consideration of the pleadings, declarations and arguments of counsel, and the Court having filed its Findings of Fact and Conclusions of Law,

IT IS ORDERED, that the City of Los Angeles, its officers, agents, servants, employees, attorneys and those persons in active concert or participation with them, including but not limited to members of the Los Angeles City Council, pending the final determination of the action herein,

ARE RESTRAINED AND ENJOINED from allowing the taxicab franchise of plaintiff Golden State Transit Corporation doing business as Yellow Cab of Los Angeles to terminate or expire or treating said franchise as though it had expired, and

ARE FURTHER RESTRAINED AND ENJOINED from otherwise interfering with plaintiff's collective bargaining with plaintiff's employees, and

ARE FURTHER RESTRAINED AND ENJOINED from interfering with plaintiff's lawful operation as a franchised taxicab company, and

ARE FURTHER RESTRAINED AND ENJOINED from initiating or prosecuting any civil or criminal proceeding against plaintiff for its lawful operation as a franchised taxicab company.

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that, upon consent of defendant and the Court hereby finding that it is proper and lawful, no bond under F.R.C.P. 65(c) be required to be filed by plaintiff.

Date: 4/13/81

/s/ A. Andrew Hauk
A. ANDREW HAUK
United States District Judge

Presented by:

MICHAEL R. MITCHELL

JOHN B. RICE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 81-1519 AAH

GOLDEN STATE TRANSIT CORPORATION,
a California corporation, doing business as
Yellow Cab of Los Angeles,
Plaintiff,

v.

CITY OF LOS ANGELES, a municipal corporation,
Defendant.

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Date: Monday, April 13, 1981

Time: 1:30 p.m.

Place: Courtroom, Honorable A. Andrew Hauk

Plaintiff's Application for Preliminary Injunction having come on for hearing April 13, 1981 before this court. The parties have presented a substantial record. After consideration of the evidence and argument of counsel, the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff Golden Transit Corporation is a California corporation doing business as Yellow Cab of Los Angeles ("Yellow Cab") with its principal place of business in the City of Los Angeles.

2. Defendant City of Los Angeles ("City") is a chartered city organized and existing under the laws of the State of California.

3. In 1977, plaintiff's predecessor was in receivership. Plaintiff was assured by several persons, including at least one responsible City official, that taxicab franchise renewal was automatic and that no Los Angeles taxicab franchise had failed to be renewed. In reliance upon these representations, plaintiff purchased the assets of its predecessor and obtained City Council approval of transfer of the franchise.

4. Since 1977, Yellow Cab has operated as the largest taxicab company in Los Angeles pursuant to a City franchise which was due to expire October 29, 1980. Twelve other City taxicab franchises were due to expire on that same date. The expiration dates of all of the franchises were extended to March 31, 1981.

5. On March 30, 1981, this court granted an application of Yellow Cab for issuance of a temporary restraining order prohibiting the City from allowing its franchise to expire.

6. Yellow Cab operated pursuant to a collective bargaining agreement with its Teamster drivers. The agreement expired in October, 1980, but was renewed by interim agreements which finally expired February 11, 1981.

7. On that same date, February 11, 1981, the Los Angeles City Council was scheduled to and did meet to consider whether to renew franchises of Yellow Cab and twelve other franchises. That same day, Yellow Cab's drivers went out, and remain, on strike. A dispute exists between Yellow Cab and its drivers regarding wages and benefits.

8. Until the strike, Yellow Cab was engaged in extensive business operations in the City of Los Angeles and at Los Angeles International Airport, and train and

bus terminals, transporting passengers who were arriving from or were departing to the various states and other countries, thereby affecting interstate commerce.

9. Yellow Cab and the other franchise holders had all made timely application for renewals of their franchises. The City's Department of Transportation made a report to the City's Board of Transportation stating that plaintiff was in full compliance with all terms and conditions of its franchise, recommending long-term renewal. On September 4, 1980, and again on January 26, 1981, defendant's Board of Transportation Commissioners recommended long-term renewal of the Yellow Cab franchise to the City Council Committee on Transportation and Traffic.

10. On November 19, 1980, the City's Committee on Transportation and Traffic recommended to the full City Council that a long-term renewal franchise be granted to Yellow Cab and certain other franchises.

11. On February 5, 1981, the Joint Council of Teamsters sent letters to the Mayor and all City Council members advising them of the existence of a labor dispute between plaintiff and the Teamsters.

12. On February 11, 1981, the City Council met to consider whether to grant taxicab franchises to the thirteen applicants. It considered a report of its Transportation and Traffic Committee dated February 2, 1981 ("Report"). The Report recommended, *inter alia*, renewal franchises for four years for six franchisees, including Yellow Cab, and for one year for seven franchsees.

13. The Report also found that the six companies recommended for full-term franchises were "in compliance with all terms and conditions of their francnise, including these five conditions (a) payment of franchise fees; (b) compliance with all rules regarding leasing/contracting operations; (c) furnish waybills and dispatch records; (d) maintain minimum number of vehicles required by franchise; and (e) compliance with Affirmative Action provisions of franchise."

14. A representative of the Teamsters appeared at the Council meeting and extensively detailed the dispute between Yellow Cab and its drivers, and recommended that Yellow Cab not receive a full franchise because of the labor dispute.

15. Thereupon, the City Council granted the recommended full-term franchises to the five other companies, but postponed consideration of Yellow Cab to February 17, 1981. The Council did, however, adopt its Committee's Report, finding that Yellow Cab and the other five companies were in full compliance with all terms and conditions of their franchises.

16. On February 17, 1981, the City Council considered whether to grant Yellow Cab a full-term four-year franchise. The Teamsters appeared and opposed the full-term grant because of Yellow Cab's labor difficulties. Thereupon, the Council granted a franchise extension only until April 30, 1981, provided that the City Council found before March 27, 1981, that the 30-day extension ordinance was "in the best interests" of the City. No other franchise grant was subject to this condition.

17. On February 17, 1981, the Teamsters told Yellow Cab that if the labor dispute was not settled, Yellow Cab was "going to have a lot of trouble" renewing the franchise.

18. On March 22, 1981, the Teamsters told Yellow Cab that the Teamsters were going to see that the Yellow Cab franchise was not going to be renewed unless union demands were met.

19. On March 23, 1981, the City Council met to consider whether it was in the "best interest" of the City to allow Yellow Cab the one month extension of its franchise. The City Council invited parties to "express their

views." Yellow Cab urged the Council to grant the extension to avoid intervening in the labor dispute. The Teamsters urged denial of the extension because, they contended, Yellow Cab was bargaining "in bad faith" with the drivers and that to grant a further extension would not be in the drivers' best interests.

20. The Teamster representative recited to the Council the purported "modest" demands labor was making on Yellow Cab and Yellow Cab's purported intransigence. He reported that the striking workers had voted, with only one dissent, "to endorse the position that the franchise not be extended. . ." He said he hoped that present Yellow Cab employees "would be hired by whatever successor is established" for Yellow Cab.

21. The AFL-CIO representative, representing the "brothers and sisters" of the Teamsters, reminded the Council that there are 700,000 union members in the County, claimed that Yellow Cab was acting in "bad faith," and urged denial of the franchise.

22. The municipal election is scheduled for Los Angeles on April 14, 1981 wherein numerous members of the City Council and the Mayor are standing for re-election.

23. The President of the Council stated that "it will be very difficult to get this ordinance passed to extend this franchise if the labor dispute is not settled by the end of the week. . ." and that "both sides should realize that [if] it is not done by the end of this week, that there is a very good possibility that there will not be a . . . franchise for Yellow Cab, it will lapse, it will be open to . . . other . . . companies."

24. Thereupon, the Council voted to defeat the motion which recommended that the Council find that it would be in the best interests of the City to extend the franchise. Yellow Cab was thereby denied even a thirty-day extension of its franchise.

25. At no point in the franchise renewal proceedings was plaintiff notified that any evidentiary or fact finding hearing would be held to determine whether the franchise should be renewed. Plaintiff was never offered an opportunity to present sworn testimony, to offer admissible evidence, or to cross-examine opposing parties under oath. The only factual findings adduced were that plaintiff was in full compliance with all the terms of its franchise.

26. Under the terms of its Charter, the City was required to have adopted an ordinance of general application establishing the procedural standards for granting an individual renewal franchise. There are no established procedural standards for renewal of taxicab franchises which Yellow Cab has failed to meet.

27. Unless the court grants the preliminary injunction requested, the status quo will change radically. Plaintiff's taxicab franchise will expire. Plaintiff's lawful right to bargain with the Teamsters will be rendered moot. Plaintiff's business will be destroyed.

28. The City has attempted substantively to influence the economic (as opposed to political) weapons of Yellow Cab and its Teamster drivers in their labor negotiation efforts, by diminishing the economic power of Yellow Cab, and increasing the economic power of the drivers. This was the City's true purpose in declining to renew plaintiff's franchise.

29. Any finding of fact which may be deemed a conclusion of law is incorporated into the Conclusion of Law section below, and any conclusion of law which may be deemed a finding of fact is incorporated in this Finding of Fact section.

CONCLUSIONS OF LAW

30. This court has jurisdiction of this action under 28 U.S.C. Section 1331 and 28 U.S.C. Section 1343 in

that it arises under the Supremacy Clause of the Constitution of the United States, Article VI, Clause 2 and the Fourteenth Amendment to the Constitution, under the National Labor Relations Act, 29 U.S.C. Sections 151-68 et seq., under the Labor Management Relations Act, 29 U.S.C. Sections 141-67 and 171-97, and the Civil Rights Act, 42 U.S.C. Sections 1983, 1985, and 1986. The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.

31. Plaintiff has raised serious questions, including but not limited to whether the conduct of the City violates the Supremacy Clause and Fourteenth Amendment due process and equal protection clauses of the United States Constitution, the National Labor Management Relations Act and the Civil Rights Act (42 U.S.C. Section 1983).

32. The actions of the City herein were and now are under color of law.

33. Denial of rights conferred by federal statute are actionable under 42 U.S.C. 1983. There is no necessity of a constitutional violation. *Maine v. Thiboutot* 100 S.Ct. 2502, 65 L.Ed.2d 555, —— U.S. —— (1980), 48 USLW 4859.

34. At a minimum, due process requires that the City could not deny the application for franchise renewal arbitrarily, capriciously, unreasonably or with no factual basis sufficient to justify the denial.

35. The City's refusal to grant Yellow Cab even a thirty-day extension, much less a four-year renewal, of its franchise by imposing a "special" requirement that the Council found it to be in the "best interest" of the City, while governing all twelve other franchise applications with no such "special" requirement, denied Yellow Cab, under color of law, of equal protectection (sic) of the laws guaranteed by the Fourteenth Amendment of the United States Constitution.

36. The City's insistence under color of law, that Yellow Cab reach an agreement with its Teamster drivers as a condition precedent to franchise extension constituted an unlawful attempt by the State, through its chartered City, to influence the conduct of parties to collective bargaining negotiations [*Lodge 76, Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976)].

37. The City's actions under color of law, further violated Yellow Cab's rights, codified in 28 U.S.C. Section 158(d) not to be compelled to agree to a proposal or make concessions to the Teamsters and Yellow Cab's right, codified in 28 U.S.C. Section 158(e) to be free of a secondary boycott, all in violation of 42 U.S.C. Section 1983.

38. The public policy favoring competition, as embodied in the Sherman Antitrust Act (15 U.S.C. Sections 1 and 2) would be served by granting the injunction prayed for.

39. In order to issue a preliminary injunction, three alternative tests are applied:

TEST 1:

(1) Has plaintiff shown a probability of success on the merits? and

(2) Has plaintiff shown the possibility of irreparable injury?

or

TEST 2:

(3) Are serious questions raised? and

(4) Does the balance of hardships tip sharply in plaintiff's favor?

Wm. Inglis & Sons Baking Co. v. ITT Cont. Baking Co. (9th Cir., 1975) 526 F.2d 86, 88.

or

TEST 3:

(5) Has plaintiff established a strong likelihood of success on the merits?

(6) Does the balance of irreparable harm favor plaintiff? and

(7) Does the public interest favor granting the injunction?

Sierra Club v. Hathaway (9th Cir., 1978) 579 F.2d 1162, 1167.

40. Plaintiff has shown a strong likelihood of success on the merits.

41. Plaintiff has shown an absolute certainty of irreparable injury if a preliminary injunction does not issue.

42. Plaintiff has raised serious questions going to the merits of the dispute.

43. The balance of hardships and irreparable harm tips sharply in plaintiff's favor.

44. The public interest favors granting the injunction.

4/13/81 /s/ A. Andrew Hauk
A. ANDREW HAUK

ACKNOWLEDGMENT OF RECEIPT

Received copy of the within document on April 9, 1981.

/s/ Esther Nelson
(Signature)

CERTIFICATE OF MAILING

I, Edward M. Kritzman, Clerk, United States District Court, Central District of California, and not a party to the within action, hereby certify that on 4/13/81, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

John B. Rice
5850 Canoga Avenue, Suite 400
Woodland Hills, CA 91367

Michael R. Mitchell
5850 Canoga Avenue, Suite 400
Woodland Hills, CA 91367

EDWARD M. KRITZMAN
Clerk

By /s/ [Illegible]
Deputy Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 81-1519 AAH (GX)

GOLDEN STATE TRANSIT CORPORATION,
a California corporation, doing business as
Yellow Cab of Los Angeles,
Plaintiff,

vs.

CITY OF LOS ANGELES, a municipal corporation,
Defendant.

ANSWER TO COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTION, DECLARATORY RELIEF AND MONEY DAMAGES

COMES NOW, defendant, the City of Los Angeles, for itself and no others and answers as follows:

JURISDICTION

1. Answering paragraphs 1 and 2, denies each and every allegation contained therein, except it admits that plaintiff has alleged damages in excess of the sum of $10,000.

PARTIES

2. Answering paragraph 3, as to the first sentence which ends on line 14, page 2, defendant lacks sufficient information or belief upon which to answer said sentence and on that basis denies generally and specifically each and every allegation contained therein except that defendant admits plaintiff has done business in the City of Los Angeles. In answer to the second sentence of said

paragraph, defendant denies that plaintiff is presently a grantee of a franchise as alleged, such franchise expiring as of March 31, 1981, but further admits, pursuant to the preliminary injunction previously issued by the court, the defendant is presently enjoined from taking any action against plaintiff based on such expiration.

3. Answering paragraph 4, defendant admits the allegations contained therein.

FACTS

4. Answering paragraph 5, beginning with the word in on line 23, page 2, and ending with the word "franchise," on line 27, page 2, defendant admits such allegation and as to the rest of said paragraph, defendant lacks sufficient information or belief upon which to answer and on that basis denies generally and specifically each and every allegation contained therein.

5. Answering paragraph 6, defendant lacks sufficient information or belief upon which to answer said paragraph, and on that basis denies generally and specifically each and every allegation contained therein, except that City admits that the transfer and assignment of the franchise rights of plaintiff's predecessor to plaintiff was subject to City Council approval.

6. Answering paragraph 7, defendant lacks sufficient information or belief upon which to answer said paragraph and on that basis denies generally and specifically each and every allegation contained therein, except defendant admits that on February 11, 1981, plaintiff's drivers went on and remain on strike.

7. Answering paragraph 8, defendant admits the allegations contained therein, except that plaintiff did not apply for renewal of its taxicab franchise but rather for a new franchise to replace its franchise about to expire and further denies that any renewal takes effect upon expiration of the existing franchise but rather the City

may grant to the holder of an expiring franchise a new franchise to replace such franchise.

8. Admits the allegations of paragraph 9 and further alleges that the defendant's power to grant it a taxicab franchise also flows from the California State Constitution, Article 11, § 7.

9. Admits the allegations of paragraph 10, 11, 12, 13 and 14.

10. Answering paragraph 15, defendant lacks sufficient information or belief upon which to answer said paragraph, and on that basis denies generally and specifically each and every allegation contained therein.

11. Answering paragraph 16, defendant admits the allegation contained therein, except for the allegation beginning on page 6, line 14, with the word "In" and ending with the number "1981" on page 6, line 16, which allegation is denied.

12. Admits the allegations contained in paragraph 17, except that defendant denies that the committee report was adopted as to plaintiff.

13. Answering paragraph 18, defendant admits the allegations contained therein, except as to the allegation beginning with the word "This" on page 7, line 6 and ending with the word "Labor" on page 7, line 8, and as to such allegation defendant lacks sufficient information or belief upon which to answer and on that basis denies that allegation.

14. Answering paragraph 19, defendant admits such allegations and further alleges that during the Council debate on the motion statements were made to Council and opinions were expressed by Council members that there was adequate taxicab service without the operations of Yellow Cab.

15. Answering paragraph 20, defendant lacks sufficient information or belief upon which to answer said para-

graph and on that basis denies generally and specifically each and every allegation contained therein, except that defendant does admit that on March 23, 1981, Mr. Morris appeared before the City Council as alleged.

16. Answering paragraphs 21 and 22, defendant denies generally and specifically each and every allegation contained therein.

FIRST CAUSE OF ACTION

17. Answering paragraph 23, defendant realleges and incorporates its responses previously given herein in response to paragraphs 1 through 22.

18. Answering paragraphs 24, and 26, denies generally and specifically each and every allegation contained therein.

19. Answering paragraph 27, beginning with the word "The" on page 9, line 21, to the word "business", on page 9, line 25, denies generally and specifically each and every allegation contained therein; admits the allegations contained in the balance of said paragraph, except for the last sentence which allegation defendant denies.

20. Answering paragraph 28, defendant denies generally and specifically each and every allegation contained therein.

SECOND CAUSE OF ACTION

21. Answering paragraph 29, the defendant realleges and incorporates its responses previously given in response to paragraphs 1 through 28.

22. Answering paragraph 22 defendant admits the allegations contained therein, except that defendant denies it had any duty to grant plaintiff a franchise.

23. Answering paragraph 31, denies generally and specifically each and every allegation contained therein.

24. Answering paragraph 32, denies generally and specifically each and every allegation therein contained and further denies that plaintiff was or will be damaged in its business in the sum of $10 million, or in any sum, or at all.

25. Answering paragraph 33, first sentence, defendant lacks sufficient information or belief upon which to answer said allegations and on that basis denies generally and specifically each and every allegation contained therein, except that defendant admits that plaintiff is faced with a loss of franchise rights; as to the balance of the paragraph, defendant admits said allegations except that it denies that the action sought is to renew and/or extend such franchise but rather to grant a new franchise replacing the expiring one.

26. Answering paragraph 34, defendant denies generally and specifically each and every allegation contained therein and further denies plaintiff is entitled to punitive or exemplary damages in the amount of $1 million, or in any amount, or at all.

THIRD CAUSE OF ACTION

27. Answering paragraph 35, defendant realleges and incorporates its responses previously given in response to paragraphs 1 through 34.

28. Answering paragraphs 36, 37, 38, and 39, defendant denies generally and specifically each and every allegation contained therein.

FOURTH CAUSE OF ACTION

29. Answering paragraph 40, defendant realleges and incorporates its responses previously given in response to paragraphs 1 through 39.

30. Answering paragraphs 41, 42, and 43, denies generally and specifically each and every allegation contained

therein, except that City admits that it denies that any of its actions violate any of plaintiff's constitutional rights as alleged.

AS FURTHER, SEPARATE and INDEPENDENT DEFENSES, the answering defendant alleges:

FIRST AFFIRMATIVE DEFENSE

31. The complaint and each of the causes of action fail to state a cause of action.

SECOND AFFIRMATIVE DEFENSE

32. This court lacks jurisdiction to award any relief against defendant as to these matters alleged.

THIRD AFFIRMATIVE DEFENSE

33. There was a rational basis for the actions and/or omissions of defendant as alleged by plainttiff to be the basis for this cause of action, namely its actions in not granting plaintiff a new franchise to replace its expiring one and all actions and omissions related thereto.

FOURTH AFFIRMATIVE DEFENSE

34. Defendant is immune from any liability for the activities complained of herein insofar as it was acting legislatively.

FIFTH AFFIRMATIVE DEFENSE

35. Defendant alleges that it is immune from liability for punitive damages.

SIXTH AFFIRMATIVE DEFENSES

36. Defendant alleges that it is immune from liability for the activities complained of herein under the Civil Rights Act.

SEVENTH AFFIRMATIVE DEFENSE

37. Defendant alleges that it is immune from liability for any injury caused by the failure to issue a franchise.

EIGHTH AFFIRMATIVE DEFENSE

38. Defendant alleges that its activity complained of was proper exercise of its police power.

NINTH AFFIRMATIVE DEFENSE

39. Plaintiff waived any right it may have had to the alleged procedural due process.

TENTH AFFIRMATIVE DEFENSE

40. Defendant, its officers, and employees acted at all times, as to the matters of which complained, in good faith and without malice.

DEMAND FOR A JURY TRIAL

Defendant hereby demands jury trial on all matters stated herein.

WHEREFORE, defendant prays that the court give judgment for defendant, and that;

1. Plaintiff take nothing by its claim;

2. Defendant be awarded costs of suit herein; including attorney's fees;

3. For such other and further relief as the court deems proper in the interest of justice.

Dated: April 20, 1981

BURT PINES
City Attorney
THOMAS C. BONAVENTURA
Sr. Asst. City Attorney
JOHN F. HAGGERTY
Assistant City Attorney

By /s/ John F. Haggerty
JOHN F. HAGGERTY
Attorneys for Defendant

UNITED STATES DISTRICT COURT
C. D. CALIFORNIA

No. CV 81-1519

GOLDEN STATE TRANSIT CORP.,
Plaintiff,

v.

CITY OF LOS ANGELES,
Defendant.

Aug. 17, 1981

John B. Rice and Michael R. Mitchell, Woodland Hills, Cal., for plaintiff.

Burt Pines, City Atty., Thomas C. Bonaventura, Senior Asst. City Atty. by John F. Haggerty, Asst. City Atty., Los Angeles, Cal., for defendant.

DECISION GRANTING PRELIMINARY INJUNCTION

HAUK, Chief Judge.

On March 23, 1981, by a vote of 11 to 1, the Los Angeles City Council voted in effect to allow the ordinance which permitted the plaintiff Golden State Transit Corporation, doing business as Yellow Cab of Los Angeles ("Yellow Cab"), to operate its taxicab franchise within the City limits to expire on midnight March 31, 1981. At the time of this vote Yellow Cab was embroiled in a labor dispute with its Teamster drivers and it is claimed by the plaintiff, Yellow Cab, that the City Council voted as it did in order to exert pressure on the plaintiff to settle its labor dispute. Yellow Cab charges that defendant City's refusal to pass an ordinance extending its

franchise constitutes: 1) an unlawful interference with a labor dispute governed by federal law, a violation of the Federal Supremacy Clause; 2) a violation of the Due Process Clause; and 3) a violation of the Equal Protection Clause. Yellow Cab, therefore, seeks a preliminary injunction enjoining the City from refusing to extend its franchise.

FACTUAL BACKGROUND

In 1977, plaintiff purchased the assets and trade name of the then defunct "old" Yellow Cab Co., and under the terms of this transaction, plaintiff was assigned the existing Yellow Cab franchise due to expire on October 29, 1980. The City Council approved this transfer on June 22, 1977.

Yellow Cab applied for a renewal of this franchise on March 30, 1980. Some twelve (12) other franchise taxicab companies also applied for renewals at the same time, inasmuch as all the City's taxicab franchises were due to expire on the same date. All of the twelve existing franchises were temporarily extended by the City Council to March 31, 1981, in order to allow an evaluation of the City's overall taxicab situation by the City Department of Transportation for recommendation to the City's Board of Transportation Commissioners.

Meanwhile, plaintiff's collective bargaining agreement with its Teamsters drivers expired in October of 1980. During negotiations for a new agreement, interim agreements were adopted and plaintiff continued to operate. The labor dispute has been subject to mediation efforts, but as of this date, Yellow Cab and its Teamster drivers have been unable to agree on the provisions of a new labor contract.

On January 16, 1981, the Department of Transportation recommended to the Board of Transportation Commissioners that the existing franchises of only six (6)

taxicab companies *including Yellow Cab*, be renewed for a four year term. The Department reported to the Board that all six companies, *including Yellow Cab*, were in full compliance with all the City's terms and conditions for renewal.

On January 26, 1981, the City Board of Transportation Commissioners recommended to the City Council's Transportation and Traffic Committee that long term renewals be granted to the Yellow Cab and the five (5) other franchises. The matter of the renewal franchises was scheduled for action by the full City Council on February 11, 1981. On that same date Yellow Cab's drivers went out and remain on strike.

Prior to the February 11 meeting, the Joint Council of Teamsters sent letters to the Mayor and all City Council members advising them of the labor dispute. A Teamster representative appeared at the February 11, City Council meeting and recommended that Yellow Cab not receive a renewal of its franchise because of the labor dispute. The City Council granted 4-year renewals to the other five franchises and postponed consideration of the Yellow Cab franchise to February 17.

At the February 17 meeting, the City Council after hearing from representatives of the Teamsters and of Yellow Cab, granted a franchise extension only until April 30, 1981, provided that the City Council found before March 27, 1981, that the 30-day extension ordinance was "in the best interests" of the City. No other franchise grant was subject to such a condition.

On March 23, 1981, the City Council met to consider whether it was in the "best interests" of the City to allow Yellow Cab the 30-day extension. Representatives of the Teamsters and the AFL-CIO detailed the facts underlying the labor dispute with Yellow Cab, alleging that plaintiff had failed to bargain in good faith, and asked that the extension be denied. Yellow Cab urged the Council to

grant the extension to avoid intervening in the labor dispute.

At the meeting, the President of the Council stated that "it will be very difficult to get this ordinance passed to extend this franchise if the labor dispute is not settled by the end of the week . . ." The Council then voted to defeat a motion which recommended that the Council find that it would be in the best interests of the City to extend the franchise, thus allowing Yellow Cab's franchise to expire on March 31, 1981. It is undisputed that the sole basis for refusing to extend plaintiff's franchise was its labor dispute with its Teamster drivers.

Yellow Cab then filed this action for declaratory and injunctive relief, and on March 30, 1981, this Court granted plaintiff's application for a temporary restraining order preserving its status as a franchised taxicab operator up to and including April 13, 1981, the date of the hearing of the instant motion for a preliminary injunction.

FACTORS TO BE CONSIDERED IN GRANTING A PRELIMINARY INJUNCTION

The standards for determining whether a preliminary injunction should be granted have found expression in this Circuit in the form of alternative tests.

> "One moving for a preliminary injunction assumes the burden of demonstrating *either* a combination of probable success and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor." *Wm. Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1975). (emphasis added).

The relationship between these two tests was explained in *Benda v. Grand Lodge of the International Association*

of Machinists & Aerospace Workers, 584 F.2d 308 (9th Cir. 1978), as follows:

> "Recent cases have made it clear . . . that there are not really two entirely separate tests, but that they are merely extremes of a single continuum. *Fox Valley Harvestore v. A. O. Harvestore Products, Inc.*, 545 F.2d 1096 (7th Cir. 1976). The critical element in determining the test to be applied is the relative hardship to the parties. *If the balance of harm tips decidely toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly. Aguirre v. Chula Vista Sanitary Service*, 542 F.2d 779 (9th Cir. 1976). No chance of success at all, however, will not suffice.' *Benda v. Grand Lodge, etc. supra*, at 315. (emphasis added).

In balancing the hardships in the present case, there can be no question but that the scales tip overwhelmingly toward Yellow Cab. The City can show no hardship whatsoever from the granting of an injunction, while the harm that would come to Yellow Cab from the denial of injunctive relief would be both substantial and irreparable—it would be forced out of business. Such being the case, the degree to which plaintiff must establish the likelihood of success on merits is significantly reduced, especially since there is no doubt that the denial of the Yellow Cab franchise presents serious questions of public policy.

PREEMPTION—SUPREMACY CLAUSE:

It is undisputed that defendant City Council's refusal to renew plaintiff's taxicab franchise was based solely on the grounds that plaintiff's union drivers were on strike. Plaintiff urges that the City Council's actions in this regard are an unlawful state interference in a labor dispute within the exclusive jurisdiction of the National Labor Relations Board constituting a violation of the Supremacy Clause, U.S. Const., art. 6 § 2.

In *Lodge 76, International Association of Machinist and Aerospace Workers, AFL-CIO, et al., v. Wisconsin Employment Relations Commission, et al.*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976), the Supreme Court discusses at length the extent to which federal labor policy preempts the authority of state and local government entities to act in matters affecting labor disputes.

The facts of *Lodge 76* are simple enough: During negotiations between Union and Company for a new collective bargaining agreement, Union employees refused to work any overtime. Company filed a charge with the N.L.R.B. stating that this refusal constituted an unfair labor practice in violation of § 8(b)(3) of the N.L.R.A. [29 U.S.C. § 158(b)(3)]. The Regional Director dismissed the charge, ruling that the action did not violate the Act. The company also filed a complaint with the Wisconsin Employment Relations Commission, and that state body found that the refusal to work overtime was an unfair labor practice under *state* law. The Wisconsin Supreme Court affirmed the Commission's ruling. In reversing the Wisconsin Supreme Court, the United States Supreme Court held that "the Union's refusal to work overtime is peaceful conduct constituting activity which must be free of regulation by the States if the congressional intent in enacting the comprehensive federal law of labor relations is not to be frustrated . . . ." *Lodge 76*, 427 U.S., at 155, 96 S.Ct. at 2560. In enacting the N.L.R.A., Congress provided legal framework for the conduct of labor disputes between employers and union organizations. Within this framework, Congress struck a balance between the economic "weapons" which were to be sanctioned for use in the bargaining arsenals of the parties to labor disputes.[1] The Supreme Court has long recognized Congress' intent that unregulated conduct be

[1] See generally Cox, Labor Law Preemption Revisited, 85 Harv.L. Rev. 1337 (1972); Lesnick, Preemption Reconsidered: the Apparent Reaffirmation of *Garmon*, 72 Col.L.Rev. 469 (1972).

"left to . . . the free play of economic forces" *N.L.R.B. v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S.Ct. 373, 377, 30 L.Ed.2d 328 (1971), and state action which deprives a party of a sanctioned weapon in such an economic contact as a labor dispute has consistently been found to be a violation of the Supremacy Clause of the Federal Constitution.

The most fundamental weapon in an employer's arsenal is its right to rely on its economic strength, in the form of weathering a strike, when there is a bargaining impasse. *Beasley v. Food Fair of North Carolina*, 416 U.S. 653, 94 S.Ct. 2023, 40 L.Ed.2d 443 (1974); *American Ship Bldg. Co. v. N.L.R.B.*, 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855 (1965). By threatening to allow Yellow Cab's franchise to terminate unless it entered into a collective bargaining agreement with the Teamsters, the City Council effectively denied Yellow Cab of its most basic weapon the economic strength of an on-going franchise. Since Congress has sanctioned the self-help measures taken by Yellow Cab here in resisting the signing of a new contract with the Union, the City Council is precluded by the Supremacy Clause from taking legislative action which would frustrate the purposes of the N.L.R.A. The City Council's actions in refusing to renew Yellow Cab's franchise thus having been preempted by federal labor law, injunctive relief must issue.

In light of the fact that plaintiff has more than met the "serious question" requirement for the issuance of a preliminary injunction on "preemption" grounds alone, this Court need not now consider the merits of plaintiff's arguments that the City Council's actions were violative of the Equal Protection and Due Process Clauses of the United States Constitution.

Accordingly, the preliminary injunction sought by plaintiff Yellow Cab against defendant City is issued.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 81-1519-AAH (GX)

GOLDEN STATE TRANSIT CORPORATION,
a California corporation, doing business as
Yellow Cab of Los Angeles,
Plaintiff,

vs.

CITY OF LOS ANGELES, a municipal corporation,
Defendant.

REQUEST FOR JUDICIAL NOTICE OF EXHIBITS ATTACHED HERETO

Hearing:

Date—April 25, 1983
Time—10:00 a.m.
Place—Courtroom 10

Judicial notice is hereby requested of the attached exhibits, referenced in this defendants Memorandum of Points and Authorities in Opposition to the Motion for Partial Summary Judgment and Preliminary Injunction.

Dated: April 6, 1983

IRA REINER
City Attorney
THOMAS C. BONAVENTURA
Sr. Asst. City Attorney
JOHN F. HAGGERTY
Assistant City Attorney

By /s/ John F. Haggerty
JOHN F. HAGGERTY
Attorneys for Defendant

EXHIBIT G

CHARTER OF THE CITY OF LOS ANGELES

Franchises and rights granted under the terms of this section shall conform to all the requirements for general franchises, as set forth in this chapter. (Added, 1925.)

Nothing in this section shall be so construed as to prevent the city from granting permits for the removal of sand and gravel from said river-bed, so long as such removal of sand and gravel shall not jeopardize or injure any structures authorized by this section. (Added, 1925.)

(8) (a) The city may grant franchises for fixed terms, permits or privileges, for the construction and operation of plants or works necessary or convenient for furnishing the city and its inhabitants with transportation, communication, terminal facilities, water, light, heat, power, refrigeration, storage, or any other public utility or service; may prescribe the terms and conditions of any such grant, and may prescribe by ordinance, approved by a vote of the people, the method of procedure for making such grants, subject to the limitations elsewhere contained in this charter; except that the Council shall adopt an ordinance which shall establish the procedure for granting to the holder of an existing franchise, any franchise required for the extension of facilities, ordered by the city, as authorized in paragraph (c) of this subdivision, or for granting a new franchise for a period not exceeding ten years, to replace a franchise about to expire, as authorized in paragraph (d) of this subdivision; provided that such procedure ordinance and every ordinance granting any such franchise shall be subject to the referendum. (Added, 1925.)

Exclusive contract for disposal of garbage is not a franchise within Charter sections governing granting of franchises.

Ponti v. Burastero, 112 Cal. App. (2d) 846,852

(b) Except as otherwise in this chapter provided, every franchise, permit or privilege, for the construction, extension or operation of a public utility shall reserve to the city the right to purchase the property of such utility, or find a purchaser therefor, upon one year's written notice, either at an agreed price or a price to be determined in a manner to be prescribed in the grant. In fixing in any franchise the price to be paid by the city for any utility, no allowance shall be made for franchise value, good will, going concern, earning power, increased cost of reproduction, severance damage, or increased value of right of way. (Added, 1925.)

(c) Every grant of every such franchise, permit or privilege, shall provide that the Board of Public Utilities and Transportation Commissioners shall have power to order extensions of the facilities authorized therein, after a hearing as provided in this charter, and the grantee of such franchise, permit or privilege shall, by its acceptance thereof, agree to comply with every such order. Provided, that when such extension of facilities is for construction or operation outside of the limits of the original franchise to which it will connect, the Council shall first grant such additional franchise rights as may be required to cover such extension. (Added, 1925.)

(d) No fixed term franchise, permit or privilege for the construction and operation of plants or works necessary or convenient for the furnishing of the city and its inhabitants with transportation, communication, terminal facilities, water, light, heat, power, refrigeration and storage, or any other public service, shall be made for a period exceeding twenty-one (21) years, except in the case of franchises for the construction and operation of subways and elevated railways, as hereinafter provided, and no such grant for the extension of an existing utility, operating under a franchise granted by the city or county, shall be made for a period beyond the expiration date of the franchise, under which such utility or the

portion of such utility with which such extension is to be connected, is held or operated, nor in any case for a period longer than twenty-one (21) years. The city may, by ordinance, five (5) years or less prior to the expiration of any franchise, grant to the holder of such franchise a new franchise to replace such franchise about to expire, such new franchise to run for a period not to exceed ten (10) years from the date of expiration of the franchise it replaces. All such franchises so granted shall be in accordance with the procedure ordinance at the time in force, and shall carry all the conditions required in the original franchise. No fixed term franchise, permit or privilege for the construction or operation of elevated railways or subways shall be granted for a period exceeding forty (40) years for the original franchise, or for a period exceeding ten

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 81-5369

GOLDEN STATE TRANSIT CORPORATION, ETC.,
Plaintiff/Appellee,

v.

CITY OF LOS ANGELES,
Defendant/Appellant.

Argued and Submitted May 7, 1982

Decided Sept. 7, 1982

Certiorari Denied Jan. 10, 1983
See 103 S.Ct. 729

John F. Haggerty, Asst. City Atty., Los Angeles, Cal., for defendant-appellant.

Thomas R. Sheridan, Simon & Sheridan, Los Angeles, Cal., argued, for plaintiff-appellee; Michael R. Mitchell, Woodland Hills, Cal., on brief.

Appeal from the United States District Court for the Central District of California.

Before ANDERSON, SKOPIL and CANBY, Circuit Judges.

CANBY, Circuit Judge.

The City of Los Angeles (City) appeals from the district court's grant of a preliminary injunction enjoining

the City from allowing the taxicab franchise of Golden State Transit Corporation d/b/a Yellow Cab of Los Angeles (Yellow Cab) to terminate or from treating the franchise as if it had expired. *See Golden State Transit Corp. v. City of Los Angeles*, 520 F.Supp. 191 (C.D.Cal. 1981). Yellow Cab alleged that the City's refusal to grant a renewal of Yellow Cab's taxicab franchise constituted unlawful interference with the ongoing collective bargaining between Yellow Cab and Teamsters Local No. 572 and deprived Yellow Cab of due process and equal protection of the law in violation of 42 U.S.C. § 1983. We agree with the district court's conclusion, 520 F. Supp. at 193, that the balance of hardships in this case tips sharply in Yellow Cab's favor. Nonetheless, since Yellow Cab does not have a fair chance of success on the merits, *see Benda v. Grand Lodge of International Ass'n of Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937, 99 S.Ct. 2065, 60 L.Ed.2d 667 (1979), we conclude that the district court abused its discretion in granting the preliminary injunction. Accordingly, we vacate the preliminary injunction.

Unlawful Interference in a Labor Dispute

The City contends that its actions did not constitute an impermissible interference in a labor dispute because (1) such interference was not the purpose behind its actions and (2) federal labor law does not preempt the City from exercising its authority to deny renewal of a taxicab franchise. We conclude that Yellow Cab has little chance of making the requisite showing that Congress intended to bar a city from refusing to renew the taxicab franchise of a company engaged in a collective bargaining dispute with its drivers. Thus, with respect to the preemption issue, Yellow Cab has failed to satisfy the "serious question" requirement for issuance of a preliminary injunction. *See id.* at 314-15.

The district court found that "the City's true purpose in declining to renew plaintiff's [Yellow Cab's] franchise" as "substantively to influence the economic (as opposed to political) weapons of Yellow Cab and its Teamster drivers in their labor negotiation efforts, by diminishing the economic power of the drivers." Excerpt of Record at 116. Courts, however, are not permitted to inquire into alleged motives of legislators. Rather, they must look to the effects of the legislative acts. *Daniel v. Family Security Life Insurance Co.*, 336 U.S. 220, 224, 69 S.Ct. 550, 552, 93 L.Ed. 632 (1949); *see United States v. Des Moines Navigation & Railway Co.*, 142 U.S. 510, 544-45, 12 S.Ct. 308, 317, 35 L.Ed. 1099 (1892). The district court did determine that one *effect* of the denial of Yellow Cab's franchise renewal was to alter the balance of power in the collective bargaining dispute in favor of the union. *See* 520 F.Supp. at 194. That determination is not clearly erroneous. *See* Fed. R.Civ.P. 52(a). There is ample evidence in the record to support a finding that by threatening to deny and ultimately denying renewal of Yellow Cab's franchise, the city deprived Yellow Cab of an economic weapon—the opportunity simply to outlast the strikers.

In view of the effect of the city's actions upon the ongoing labor dispute, we must consider whether the National Labor Relations Act, as amended, 29 U.S.C. §§ 151-169, preempted the City's power to deny Yellow Cab's application for renewal of its franchise. Federal labor legislation seeks to strike a balance between the power of labor and management by protecting certain activities, *see* 29 U.S.C. § 157, prohibiting certain practices, *see id.* § 158, and leaving other conduct "unregulated because left 'to be controlled by the free play of economic forces.'" *Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140, 96 S.Ct. 2548, 2553, 49 L.Ed.2d 396 (1976) (*quoting NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S.Ct. 373, 377, 30 L.Ed.2d 328 (1971)); *accord, New York Telephone Co. v. New York State Dep't of Labor*, 440 U.S. 519, 531, 99 S.Ct. 1328, 1336, 59 L.Ed.2d 553 (1979) (plurality opinion); *Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton*, 377 U.S. 252, 259-60, 84 S.Ct. 1253, 1258, 12 L.Ed.2d 280 (1964). Yellow Cab contends that the actions of the City fall within the last of these three categories and therefore are preempted by federal law. The Supreme Court, however, has clearly stated that where interests "deeply rooted in local feeling and responsibility" are affected, we may not lightly infer that Congress intended to deprive state and local governments of the power to act. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959), *quoted with approval in Lodge 76*, 427 U.S. at 136, 96 S.Ct. at 2551. In such an instance, a finding of preemption must rest upon "compelling congressional direction." *San Diego Building Trades Council*, 359 U.S. at 244, 79 S.Ct. at 779.

The use of streets and highways is a "traditionally local matter" left to state and local regulation under the police power. *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749, 62 S.Ct. 820, 825, 86 L.Ed. 1154 (1942), *quoted in Lodge 76*, 427 U.S. at 136 n.2, 96 S.Ct. at 2551 n.2. Yellow Cab has not brought to our attention nor have we found any evidence that might rise to the level of a "compelling congressional direction" to deprive a local government of the power to deny a franchise renewal to a franchise involved in a labor dispute. We therefore conclude that Yellow Cab has little chance of prevailing on the merits of the preemption question. *See Benda*, 584 F.2d at 315.

Due Process

The City contends that Yellow Cab has no constitutionally protected property interest in a franchise renewal and, therefore, denial of Yellow Cab's application for a franchise renewal did not deprive Yellow Cab of procedural due process. We agree.

The requirements of procedural due process apply only to deprivations of a constitutionally protected liberty or property interest. *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). "A property interest in a benefit protected by the due process clause results from a legitimate claim of entitlement created and defined by an independent source, such as state or federal law." *Russell v. Landrieu*, 621 F.2d 1037, 1040 (9th Cir. 1980). Yellow Cab has failed to bring to our attention any state law or city ordinance that creates an expectation of entitlement to a franchise renewal. The relevant provision of the Los Angeles City Charter provides in part: "The City *may*, by ordinance, . . . grant to the holder of such franchise a new franchise to replace such franchise about to expire." Los Angeles City Charter, § 3, subdiv. 8(D); Excerpt of Record at 4 (emphasis added). The wording of the statute is permissive, not mandatory, thus conferring on the City discretion to deny franchises to applicants even if they meet any established eligibility requirements. *See Erdelyi v. O'Brien*, 680 F.2d 61, 63 (9th Cir. 1982); *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980). Moreover, Yellow Cab has not referred us to a set of standards defining eligibility for renewal. *Cf. Board of Regents v. Roth*, 408 U.S. at 566-67, 92 S.Ct. at 2703 (absent statutory or administrative standards defining eligibility for reemployment, decision whether to rehire a nontenured teacher is left to unfettered discretion of state university officials). Yellow Cab does not assert that the terms of the original franchise secure a property interest in renewal. Nor has Yellow Cab alleged the existence of rules and understandings promulgated and fostered by city officials that might justify a legal entitlement. *See Perry v. Sindermann*, 408 U.S. 593, 602-03, 92 S.Ct. 2694, 2700, 33 L.Ed.2d 570 (1972) (policies and practices may establish legitimate claim of entitlement). The recommendation by various city committees that Yellow Cab's franchise be renewed does not rise to the level of a de facto guarantee of renewal equivalent to the de facto tenure system alleged in *Perry v. Sindermann*. At most, Yellow Cab had only a unilateral hope for renewal. *Geriatrics, Inc. v. Harris*, 640 F.2d 262 (10th Cir. 1981), *cert. denied*, 454 U.S. 832, 102 S.Ct. 129, 70 L.Ed.2d 109. Nor is the interest asserted by Yellow Cab so fundamental as to warrant protection aside from state and local law or practice. *See Jacobson v. Hannifin*, 627 F.2d at 180.

In sum, Yellow Cab has failed to raise a serious question with resepct to the threshold issue in a procedural due process claim—whether the claimant has a constitutionally protected liberty or property interest.

Equal Protection

The City next argues that its actions did not violate the Equal Protection Clause because they furthered legitimate governmental interests, namely provision of quality taxicab service and adequate compensation for taxicab drivers. Yellow Cab asserts that the sole purpose behind the differential treatment of Yellow Cab vis-a-vis the other applicants was the City's desire to coerce Yellow Cab into yielding to union demands. We conclude that Yellow Cab does not have a fair chance of demonstrating that the alleged classification is not rationally related to a legitimate governmental purpose.

In reviewing a state statute or local ordinance under the Equal Protection Clause, courts generally presume that the legislative act is valid. *Parham v. Hughes*, 441 U.S. 347, 351, 99 S.Ct. 1742, 1745, 60 L.Ed.2d 269 (1979). Where neither a fundamental right nor a suspect class is implicated, legislative classifications are constitutional if they bear some rational relationship to a permissible governmental objective. *Id.; Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977). The burden is on the party challenging the legislative judgment to convince the court that there is no

set of facts that may reasonably be conceived to justify the classification. *Vance v. Bradley*, 440 U.S. 93, 111, 99 S.Ct. 939, 949, 59 L.Ed.2d 171 (1979); *Lamb v. Scripps College*, 627 F.2d 1015, 1021 & n.9 (9th Cir. 1980).

The City, in acting on the 12 applications for franchise renewals created a classification that differentiated between the one applicant engaged in a collective bargaining dispute and the remaining applicants not involved in such a dispute. Even assuming that the members of the council were motivated at least in part by an impermissible purpose, that classification still survives judicial scrutiny. It is well settled that a reviewing court "will not strike down an otherwise constitutional statute on the basis of an allegedly illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383, 88 S.Ct. 1673, 1682, 20 L.Ed.2d 672 (1968); *accord, Kalish v. United States*, 411 F.2d 606, 607 (9th Cir.), *cert. denied*, 396 U.S. 835, 90 S.Ct. 93, 24 L.Ed.2d 86 (1969). The classification is valid if some legitimate state interest is advanced. The reviewing court need not and should not ascertain whether the particular governmental interest was the primary legislative purpose. *McGinnis v. Royster*, 410 U.S. 263, 276-77, 93 S.Ct. 1055, 1062, 35 L.Ed.2d 282 (1973). The City has advanced as the permissible governmental purposes behind its actions both the provision of quality taxicab service and the assurance of adequate compensation for taxicab drivers. Although these interests were not asserted until after the differential treatment of Yellow Cab had commenced, the "courts may properly look beyond the articulated state interest at the time of enactment in testing a statute under the rational basis test." *Lamb v. Scripps College*, 627 F.2d at 1021 n.9.

We conclude that Yellow Cab has not met, and has little chance of meeting, its burden of establishing that no set of facts may reasonably be conceived to justify the classification. *See Vance v. Bradley*, 440 U.S. at 111,

99 S.Ct. at 949; *Lamb v. Scripps College*, 627 F.2d at 1021 & n.9. The City could have rationally determined that denying Yellow Cab's application for renewal of its franchise would cause or contribute to higher levels of taxicab service and increased compensation for taxicab drivers.

The district court's grant of a preliminary injunction is vacated.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 81-1519-CHH (GX)

GOLDEN STATE TRANSIT CORPORATION,
a California corporation, doing business as
Yellow Cab of Los Angeles,
Plaintiff,

vs.

CITY OF LOS ANGELES, a municipal corporation,
Defendant.

PROPOSED STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

Date: October 17, 1983
Place: Room 10
Time: 10:00 a.m.

1. Plaintiff, Golden State Transit Corporation, doing business as Yellow Cab of Los Angeles, is a corporation organized and existing under and by virtue of the laws of the State of California, and doing business in and with its principal office in the City of Los Angeles.

2. Defendant, City of Los Angeles, is a chartered City organized and existing under the Constitution and laws of the State of California.

3. Taxicab service in the City of Los Angeles involves the operation of taxicabs under franchises or other permits granted by the City of Los Angeles. There is no

way to operate a taxicab service in said City other than through the grant of a franchise or other permit from the City. The City of Los Angeles thus has the exclusive control over who will be permitted to operate a taxicab service within its limits.

4. Defendant, City of Los Angeles, is able to grant franchises for the operation of taxicab service.

5. On March 31, 1980, plaintiff applied in a timely manner for renewal of its taxicab franchise, said renewal to take effect upon the expiration of the existing franchise. The defendant's Department of Transportation stated in its report to the Board of Transportation Commissioners that plaintiff was in full compliance with all terms and conditions of the franchise.

6. Defendant's power to grant a taxicab franchise flows from the Los Angeles City Charter, § 3, Subdivision 8, Los Angeles Municipal Code § 71.12(b) and Procedure Ordinance No. 58,200, codified in Los Angeles Administrative Code Division 13, Chapter 1, Articles 2 through 13, inclusive.

7. The specific procedure for granting and renewal of any franchise is established under Paragraph A and Paragraph D of Subdivision 8, of § 3 of the Los Angeles City Charter providing in part that:

> (A) "The Council shall adopt an ordinance which shall establish the procedure . . . for granting a new franchise [to the holder of an existing franchise] for a period not exceeding ten years, to replace a franchise about to expire as authorized in Paragraph D of this subdivision . . ."
>
> (D) "The City may, by ordinance, adopted five years or less prior to the expiration of any franchise, grant to the holder of such franchise about to expire, such new franchise to run for a period not to exceed ten years from the date of expiration of the

franchise it replaces. All such franchises so granted shall be in accordance with the procedure ordinance at the time in force, and shall carry all the conditions required in the original franchise . . ."

8. By Ordinance Number 149,825, effective July 17, 1977, the Los Angeles City Council enacted an ordinance granting a taxicab service franchise to plaintiff, more particularly entitled "An ordinance consenting to the assignment by Yellow Cab Company for California of the franchise [to Los Angeles Yellow Cab] granted by ordinance and amendments herein prescribed. "Under the terms of said ordinance, plaintiff's franchise was to expire on October 29, 1980. By ordinance Number 154,409 and 154,713, the above ordinance was amended to extend the expiration period until March 31, 1981. None of these ordinances provided for an extension beyond the term of the franchise.

9. Approval of the renewal of plaintiff's franchise was recommended by the Board of Transportation Commissioners in its report to Transportation and Traffic Committee of the City Council on September 4, 1980, and again on January 26, 1981. On November 19, 1980, the Transportation and Traffic Committee recommended to the full City Council that a five year renewal franchise be granted to plaintiff.

10. Of the thirteen taxicab franchises within the City of Los Angeles, plaintiff was among six recommended by the Department of Transportation for five year renewal; six of the remaining seven franchises were recommended for approval for one year; one franchise was not recommended for approval.

11. The ordinance approving plaintiff's franchise as well as ordinances approving the other franchises (including the franchise which had been disapproved by the Department of Transportation), were placed on the City Council calendar for February 11, 1981.

12. On February 5, 1981, by letter to the Mayor and all Council members, the joint council of Teamsters informed the City Council that a labor dispute existed between plaintiff and the Teamsters, who represented the Yellow Cab drivers. All of the other franchises scheduled for granting were renewed on February 11, 1981. On February 11, 1981, the Yellow Cab drivers went out on strike.

13. On February 11, 1981, the City Council adopted the Committee report and ordinance granting multi-year franchises to five of the enumerated companies. Plaintiff was deleted from the list of companies, and the ordinance pertaining to its multi-year franchise was continued for consideration to February 17, 1981. The Committee report stated that all six companies, including plaintiff, were in full compliance with all terms and conditions of their franchises. That Committee report was adopted.

14. On February 17, 1981, the City Council considered the question of the franchise for plaintiff. The multi-year ordinance which had been continued from February 11, 1981, was not presented to the City Council at that time. Instead, a substitute ordinance was presented which provided for an extension of the Golden State franchise to April 30, 1981, provided, among other things, that the City Council was to find on or before March 27, 1981, that the 30-day extension ordinance was in the best interests of the City.

15. On March 23, 1981, the City Council considered a motion made by the chairperson of the Transportation and Traffic Committee that the City Council adopt a finding that the 30-day extension of the plaintiff's franchise was in the best interest of the City.

16. At the hearing of March 23, 1981, a representative of the Teamsters appeared before the City Council and urged the Council not to renew or grant an extension to plaintiff's franchise.

17. At the same hearing a representative of an association of taxi drivers appeared before the City Council, stating that with the non-operation of Yellow Cab taxicab drivers were able to make for the first time, a decent minimal living and further stated that doormen of the major hotels had reported to him that they were getting a better quality of service with the non-operation of Yellow Cab.

18. The General Manager of the City's Department of Transportation, the City department which regulates taxicabs, informed the City Council, at the hearing, that the department had not received any complaints from lack of service since Yellow Cab had gone out on strike February 11. He further stated that prior to the Yellow Cab strike there were too many taxicabs operating in the City. One of the Councilmen commented that a more healthy taxicab industry would actually be created if Yellow Cab's franchise was not renewed.

19. The motion to make the finding to allow for the extension was defeated by the City Council 11 votes to one.

CONCLUSIONS OF LAW

1. Any Finding of Fact deemed a Conclusion of Law is incorporated herein.

2. Plaintiff has conceded that it cannot prevail on its equal protection claim under the standard articulated in *Golden State Transit Corp. v. City of Los Angeles*, 686 F.2d 758 (9th Cir. 1982).

3. Plaintiff did not have a legitimate claim of entitlement to renewal of its taxicab franchise. The informal assurances allegedly received from various city officials do not rise to the level of the "binding understanding" between Golden State and the City that is needed to create a constitutionally protected property interest. *See Perry v. Sinderman*, 408 U.S. 593, 599, 92 S. Ct. 2694,

2699 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972).

4. The National Labor Relations Act does not preempt the City's franchise renewal power. *Golden State Transit, supra*, 686 F.2d at 760. The legislative history cited by plaintiffs does not support a contrary conclusion.

Dated: October 18, 1983.

/s/ Cynthia Holcomb Hall
CYNTHIA HOLCOMB HALL
United States District Judge

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

CA No. 83-6441

GOLDEN STATE TRANSIT CORPORATION,
a Cailfornia corporation,
Plaintiff/Appellant,
v.

CITY OF LOS ANGELES, a municipal corporation,
Defendant/Appellee.

Argued and Submitted Oct. 3, 1984

Decided Feb. 26, 1985

Zachary D. Fasman, Kathleen Johnson Raynsford, David B. Siegel, Crowell & Moring, Washington, D.C., Daniel R. Shulman, Patricia A. Knipe, Gray, Plant, Mooty, Mooty & Bennett, Minneapolis, Minn., for plaintiff-appellant.

John F. Haggerty, Los Angeles, Cal. for defendant-appellee.

Appeal from the United States District Court for the Central District of California.

Before FARRIS, ALARCON and NORRIS, Circuit Judges.

FARRIS, Circuit Judge:

Golden State Transit purchased the assets of the bankrupt Yellow Cab Company in 1977 and the City there-

after approved the transfer of Yellow Cab's franchise. On March 31, 1989, Golden State made a timely application for renewal of its taxicab franchise to become effective upon its expiration on March 31, 1981. The City's Department of Transportation reported that Golden State was in full compliance with all of the terms and conditions of its franchise. Acting on this report, the Board of Transportation Commissioners recommended approval of the franchise renewal to the Transportation and Traffic Committee of the City Council on September 4, 1980 and again on January 26, 1981. The Transportation and Traffic Committee recommended to the City Council that Golden State be granted a five-year renewal franchise.

An ordinance approving Golden State's franchise as well as ordinances approving twelve other taxicab franchises operating within the City were placed on the City Council calendar for February 11, 1981. In October 1980, Golden State's agreement with the Teamster's Union expired and they failed to reach a new agreement. On February 5, 1981, the Teamsters informed the City of the labor dispute. On February 11, 1981, Golden State drivers went out on strike.

All pending franchises except Golden State's were renewed on February 11, 1981, including one that had been disapproved by the Department of Transportation. The ordinance pertaining to Golden State was continued to February 17, 1981 to take effect if the Council found, on or before March 27, 1981, that the extension was in the best interest of the City.

On March 23, 1981, the City Council considered a motion to adopt a finding that the 30-day extension of Golden State's franchise was in the best interests of the City. The motion was defeated eleven votes to one. Golden State brought suit in district court charging that the City's action was preempted by the NLRA, as well as

being violative of the due process and equal protection clauses of the United States Constitution. The district court granted Golden State's request for a preliminary injunction preserving its status as a franchised operation on the basis of its preemption claim. *See Golden State Transit Corp. v. City of Los Angeles*, 520 F.Supp. 191, 194 (C.D.Cal.1981). We reversed. *Golden State*, 686 F.2d 758, 760-761 (9th Cir.1982), *cert. denied*, 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 954 (1983).

Golden State thereafter amended its complaint to allege a violation of the Sherman Act by the City. The district court granted summary judgment against Golden State on the grounds that the City was immune from antitrust liability. *Golden State*, 563 F.Supp. 169, 172 (C.D.Cal.1983). We affirmed. *Golden State*, 726 F.2d 1430 (9th Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 1865, — L.Ed.2d —— (1985). We denied the petition for rehearing and en banc review. The district court then granted summary judgment against Golden State on its remaining claims. Golden State appealed.

Two questions are presented for our *de novo* review:

Was the City preempted from refusing to renew Golden State's taxicab franchise?

Did Golden State allege a sufficient constitutionally protected property interest to justify a trial on the question of a due process violation?

PREEMPTION ISSUE

The Supreme Court has articulated two distinct bases for preemption of state action by the NLRA. The first, which is founded on the primary jurisdiction of the NLRB, preempts state action concerned with conduct that is at least arguably prohibited or protected by the Act. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959). The state action will not, however, be preempted if the

conduct regulated is only a peripheral concern of the Act or touches interests deeply rooted in local feeling and responsibility. *Id.* at 243-44, 79 S.Ct. at 778-79. A supplemental branch of preemption prohibits state action concerning conduct that was intended to be unregulated because it was considered a proper economic weapon for use by parties to a labor dispute. *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140, 96 S.Ct. 2548, 2553, 49 L.Ed.2d 396 (1976).

The district court granted Golden State a preliminary injunction based upon its preemption claim. On interlocutory appeal, we held that the power of taxicab franchise renewal was a matter of such local interest that preemption "must rest upon 'compelling congressional direction.'" 686 F.2d at 760 (citation omitted). Finding no such evidence, we vacated the district court's grant.[1] Then, in opposition to the City's motion for summary judgment, Golden State introduced legislative history of an amendment to the NLRA and alleged that it demonstrated Congress' specific intent to preempt actions such as the City's. The district court found the legislative history unpersuasive and granted the City's motion.

Initially, Golden State argued on this appeal that the district court erred in finding that the legislative history

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[1] We did uphold the district court's determination that the nonrenewal of Golden State's franchise altered the balance of economic power in the labor dispute, noting that it was supported by "ample evidence in the record." 686 F.2d at 759. For this reason, we cannot agree with Judge Norris' suggestion, in his concurrence, that summary judgment was appropriate because Golden State has failed to present any evidence supporting its claim that the City's action affected its bargaining power. To affirm the trial court's grant of summary judgment to the city, we must view the evidence in the light most favorable to Golden State. *See Fruehauf Corp. v. Royal Exchange Assurance of America*, 704 F.2d 1168, 1171 (9th Cir. 1983). The district court previously found that the City's action did affect Golden State's bargaining power. We cannot disregard that finding.

cited by Golden State did not demonstrate a "compelling congressional direction" to preempt the City's action. Golden State now argues that application of the local interest exception to NLRA preemption in this case was inappropriate. We agree with Golden State. Because the district court's decision is supported by other grounds, however, we affirm its grant of summary judgment on the preemption issue.[2]

The City's renewal of taxicab franchises was held to fall within the local interest exception because we found NLRA preemption harder to infer when a state is regulating such a " 'traditionally local matter' " as the "use of streets and highways." 686 F.2d at 760 (citing *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749, 62 S.Ct. 820, 825, 86 L.Ed. 1154 (1942), quoted in *Lodge 76*, 427 U.S. at 136 n. 2, 96 S.Ct. at 2551 n. 2). Our reliance on *Allen-Bradley* was misplaced.[3] That case dealt with a violent

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[2] Golden State also contends that the local interest exception only applies to preemption based on the primary jurisdiction of the NLRB. Golden State thus argues that the local interest exception is inapposite, because this case involves substantive rights to economic self-help under the NLRA. In the past, the Supreme Court has applied the local interest exception to matters of substantive economic rights. *See, e.g., Lodge 76*, 427 U.S. at 136-37, 154-55, 96 S.Ct. at 2551-52, 2560. Recent Supreme Court decisions, however, indicate that this exception is not appropriate in cases involving substantive rights. *See, e.g., Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, —— U.S. ——, 104 S.Ct. 3179, 3187, 82 L.Ed.2d 373 (1984). Because we affirm on another ground we do not address this issue.

[3] The City argues that our prior decision on the preliminary injunction is law of the case and reconsideration of it is barred. This assertion is wrong. As a general rule, decisions on preliminary injunctions do not constitute law of the case and "parties are free to litigate the merits." *City of Anaheim v. Duncan*, 658 F.2d 1326, 1328 n. 2 (9th Cir. 1981). In addition, we may exercise our discretion to hear "contrary controlling authority on the applicable issues of law." *Sidney v. Zah*, 718 F.2d 1453, 1458 (9th Cir. 1983) (citations omitted). This appeal is described by both of these propositions. We therefore reject the City's contention.

and unruly picket outside of the employer's factory in which the strikers were blocking the streets and threatening working employees. Moreover, the Supreme Court has strictly limited the local interest exception to matters involving violence and tort actions, such as libel and intentional infliction of emotional distress. *See, e.g., New York Telephone Co. v. New York State Labor Dep't*, 440 U.S. 519, 550-51, 99 S.Ct. 1328, 1346, 59 L.Ed.2d 553 (1979) (Blackmun, J., joined by Marshall, J., concurring in plurality opinion); *Lodge 76*, 427 U.S. at 136, 96 S.Ct. at 2551 (focus of local interest exception is the "[p]olicing of actual or threatened violence . . . or destruction of property"). There are no allegations of violent, destructive, or tortious conduct in this case.

The First Circuit has extended the local interest exception to hospital cost containment legislation. *See Massachusetts Nursing Ass'n v. Dukakis*, 726 F.2d 41, 44 (1st Cir. 1984). That decision, however, was also based upon strong congressional support for such programs and the indirect effect the challenged legislation had on labor relations. *Id.* at 43-45. Supreme Court precedent and the distinguishing circumstances in *Dukakis* cause us to conclude that the extension of the local interest exception to this case was unwarranted. This conclusion does not, however, resolve the matter.

The peripheral concern exception to labor preemption recognizes that the NLRA "does not withdraw 'from the States . . . power to regulate where the activity regulated [is] a merely peripheral concern of the [act].' " *Lodge 76*, 427 U.S. at 137, 96 S.Ct. at 255-52 (footnote omitted). This exception allows states to regulate matters when there is only a remote possibility of conflict between such regulation and national labor policy. *See id.* at 137-38 n. 3, 96 S.Ct. at 2551-52 n. 3. Preemption is thus required only when a state "enforce[s] stat-

utes or rules of decision resting upon its views concerning accommodation of the same interests" focused upon by the NLRB. *Lodge 76*, 427 U.S. at 140 n.4, 96 S.Ct. at 2553 n. 4 (quoting Cox, *Labor Law Preemption Revisited*, 85 Harv.L.Rev. 1337, 1352 (1972). Similarly, in *New York Telephone*, the Court held that New York's unemployment compensation program, which authorized payments to striking workers, was not preempted, in part, because the program was not intended to regulate labor relations "but instead to provide an efficient means of insuring employment security." 440 U.S. at 533, 99 S.Ct. at 1337 (Stevens, J., plurality opinion).[4] Nothing in the record indicates that the City's refusal to renew or extend Golden State's franchise until an agreement was reached and operations resumed was not concerned with transportation. Such a concern does not implicate or conflict with federal labor policy. There is therefore no basis to preempt the City's action.

In any regulated industry, a myriad of governmental decisions from rate-setting to the establishment of safety standards are bound to affect labor relations in that industry. If local regulation of public utilities is not to be unduly restricted, only actions seeking to directly alter the substantive outcome of a labor dispute should be preempted. *Cf. Dukakis*, 726 F.2d at 45; *Amalgamated Transit Union, Div. 819 v. Byrne*, 568 F.2d 1025, 1042 (3d Cir. 1977) (en banc) (Adams, J., dissenting). The City did not attempt to dictate terms of the collective

[4] Although the Supreme Court has indicated that the local interest exception does not apply to preemption based upon substantive economic rights, *see supra* footnote 2, the considerations represented by the peripheral concern exception are not similarly limited. There is no doubt that the focus of the peripheral concern exception on the potential for conflict between state regulation and federal labor policy is an appropriate consideration under both branches of preemption. *See, e.g., Brown*, —— U.S. ——, 104 S.Ct. at 3187 (examining state regulation of union officials for possible conflict with employees' rights); *see also New York Telephone*.

bargaining agreement or alter the substantive outcome of the dispute. It merely insisted upon resolution of the dispute as a condition to franchise renewal. The City's refusal to renew Golden State's franchise is therefore not preempted by the NLRA.

DUE PROCESS ISSUE

Golden State contends that the assurances made by various City officials regarding franchise renewal constitute a mutual understanding sufficient to create a constitutionally protectable property interest under the *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) formulation. There is no evidence of the mutual understanding necessary to establish such an interest; at most, Golden State had a unilateral expectation of renewal. 686 F.2d at 760-61.

Golden State's assertion that *Vail v. Board of Education of Paris Union School District 95*, 706 F.2d 1435 (7th Cir. 1983), *aff'd per curiam*, —— U.S. ——, 104 S.Ct. 2144, 80 L.Ed.2d 377 (1984) establishes the sufficiency of its interest in franchise renewal is mistaken. In that case, the school board voted to assure the plaintiff that his one-year coaching contract would be renewed for a second year. 706 F.2d at 1436. The school board was the body authorized to make hiring decisions and their informal assurance was thus sufficient to bind the school district. In the present case, franchise renewal is a legislative act, *see, e.g., Monarch Cablevision v. City Council*, 239 Cal.App.2d 206, 210, 48 Cal.Rptr. 550, 553 (1966), and all legislative power is vested in the City Council to be exercised by ordinance. Los Angeles City Charter § 21. The City officials that allegedly promised Golden State "automatic" franchise renewal had no authority to act for the City and therefore no mutual understanding was created on the basis of their representation.

Golden State, relying on *Doran v. Houle*, 516 F.Supp. 1231 (D. Mont. 1982), contends that licensees have a protected property interest in their license renewals. We vacated the *Doran* decision on precisely the grounds that Golden State cites it for. *See* 721 F.2d 1182 (9th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 2152, 80 L.Ed.2d 538 (1984). In that decision, the federal government's termination of the plaintiff veterinarians' permits to use testing kits to check for a contagious disease in cattle was upheld. There was no showing of a mutual agreement to contradict the otherwise unfettered discretion the government retained over the use of the kits. 721 F.2d at 1186. We held that the "mere fact a person has received a government benefit in the past, even for a considerable length of time, does not, without more, rise to the level of a legitimate claim of entitlement." *Id.* (citation omitted).

Affirmed.

NORRIS, Circuit Judge, concurring in part and concurring in the judgment.

I concur in the judgment of the court affirming the district court's grant of summary judgment of the City. I also concur in that part of the majority opinion holding that Golden State's due process claim must fall because Golden State has failed to establish that a constitutionally protectable property interest was created.

I write separately, however, because I believe it is wholly unnecessary to the disposition of this appeal to address Golden State's legal argument that the NLRA prohibits a City from refusing to renew Golden State's franchise under what Golden State alleges to be the facts of this case.[1] Golden State's preemption argument is con-

[1] Because I view the majority's discussion of the preemption issue as dicta, I refrain from commenting on what I perceive to be serious deficiencies in its analysis.

structed on two factual premises: (1) that the City's purpose in refusing to renew the franchise was to assist the Teamsters in their labor dispute with Golden State, and (2) that the effect of the City's refusal to renew the franchise was to destroy Golden State's economic ability to resist the strike.[2] Golden State cites no evidence, however, that gives rise to a triable issue of fact with respect to either of these factual allegations. As a result, we should hold that the City is entitled to summary judgment on the narrow ground that Golden State has offered no substantial evidence to support its critical factual allegations. It is totally unnecessary for us to go further and discourse on the legal question of the possible preemptive effect of the NLRA on the City's action.

[2] In short, Golden State's argument is that the City's refusal to renew its franchise is preempted by the NLRA because it constituted an attempt to dictate the terms of a collective bargaining agreement or because it otherwise altered the relative bargaining powers of the parties to a labor dispute. As support for this argument, Golden State relies on the line of cases recognizing that certain state actions that alter the relative bargaining positions of labor and management may "frustrate effective implementation of the Act's processes" and therefore be preempted. *E.g. Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132, 147-48, 96 S.Ct. 2548, 2556-57, 49 L.Ed.2d 396 (1976).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 81-1519 AAH

GOLDEN STATE TRANSIT CORPORATION,
a California Corporation, doing business as
YELLOW CAB OF LOS ANGELES,
Plaintiff,

vs.

THE CITY OF LOS ANGELES, a Municipal Corporation,
Defendant.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Date: September 15, 1986

Time: 10:00 A.M.

Courtroom: Hon. A. Andrew Hauk

The United States Supreme Court stated that the District Court's finding that the Los Angeles City Council had conditioned their franchise on the settlement of the labor dispute was supported by certain objective factors. (Page 23 of Plaintiff's Motion, including Footnote 6.) One of these alleged objective factors was what the court stated the City Attorney told the parties. (Page 20 of Plaintiff's Motion.)

The court stated that the Assistant City Attorney had clearly informed the parties that it was the City's position that there was a possibility of reopening the issue of

the franchise renewal if the parties settled their labor dispute before the franchise expired the following week. The court quotes Page 68 of the Joint Appendix. The statement of the Assistant City Attorney before the Council and the dialogue which preceded it, on Pages 67-68 of the United States Supreme Court transcript are contained on pages 32-33 of Plaintiff's Motion and attached to the accompanying Declaration of John F. Haggerty.

The transcript clearly shows that the City Attorney was responding to a question as to whether the parties had been informed that the Council had to make the necessary finding by Friday and that the ordinance had to be passed and published by the end of the month. The finding referred to was that it was in the best interest of the City to extend the franchise. (Opinion, Page 20 of Plaintiff's Motion.) The transcript does not show that the Assistant City Attorney made any statement telling the parties that there was a possibility for reopening the issue of the franchise renewal if the parties settled their labor dispute before the franchise expired the following week.

The record in no way supports the conclusion that the Council reached a consensus for rejection of the extension with the possibility of reopening the issue if the parties settled their labor dispute before the franchise expired the following week. Though four members arguably endorsed this approach, the defeat of the franchise renewal by the City Council was 11 votes to 1 vote. There was testimony before the Council at their March 23rd hearing, wherein they defeated the motion which would have allowed a renewal of the franchise, that with the non-operation of Yellow Cab (Golden State) taxicab drivers were able to make for the first time a decent minimal living and that doormen of the major hotels had reported that they were getting a better quality of services with the non-operation of Yellow Cab. (CR4, Exhibit 15,

Pages 6-7.) There was additional testimony from the General Manager of the Department of Transportation, the City department which regulates taxicabs, that that Department had not received any complaints as to a lack of service with the non-operation of Yellow Cab and that before the strike of Yellow Cab's drivers there were too many taxicabs operating in the City. (CR4, Exhibit 15, Pages 14-15.) The vote and the fact that there was the above-referenced testimony before the City Council is undisputable.

Obviously, this Court must proceed in accordance with the law of the case. The record, however, shows what the facts are.

DATED: August 29, 1986

Respectfully submitted,

JAMES K. HAHN
City Attorney
THOMAS C. BONAVENTURA
Senior Assistant City Attorney
JOHN F. HAGGERTY
Assistant City Attorney

By /s/ John F. Haggerty
JOHN F. HAGGERTY
Assistant City Attorney
Attorneys for Defendant
City of Los Angeles

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, say: I am a citizen of the United States and a resident of the County of Los Angeles. I am over the age of 18 years and not a party to within action or proceeding. My business address is 1800 City Hall East, 200 North Main Street, Los Angeles, California 90012

On August 29, 1986, I served the within MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

on the person(s) indicated below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

ZACHARY D. FASMAN, Esq.
LUTHER ZIEGLER, Esq.
CROWELL & MORING
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

WILLIAM B. CAMPBELL, Esq.
NICHOLAS DeWITT, Esq.
PAUL, HASTINGS, JANOFSKY & WALKER
555 South Flower Street
Twenty-Second Floor
Los Angeles, California 90071

xx—Federal—I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 29, 1986, at Los Angeles, California.

/s/ Anna Marie Schwaber
ANNA MARIE SCHWABER

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 81-1519 AAH

GOLDEN STATE TRANSIT CORPORATION,
a California Corporation, doing business as
YELLOW CAB OF LOS ANGELES,
Plaintiff,

vs.

THE CITY OF LOS ANGELES, a Municipal Corporation,
Defendant.

DECLARATION OF JOHN F. HAGGERTY IN SUPPORT OF OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Date: September 15, 1986

Time: 10:00 A.M.

Courtroom: Hon. A. Andrew Hauk

I, JOHN F. HAGGERTY, declare that:

1. I am one of the attorneys representing the defendant in this action.

2. This declaration is made on personal knowledge and if called to testify on the matters contained herein the declarant could competently do so.

3. Attached hereto are pages 67-68 of the Joint Appendix filed with the Supreme Court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of August, 1986, at Los Angeles, California.

/s/ John F. Haggerty
JOHN F. HAGGERTY

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, say: I am a citizen of the United States and a resident of the County of Los Angeles. I am over the age of 18 years and not a party to the within action or proceeding. My business address is 1800 City Hall East, 200 North Main Street, Los Angeles, California 90012

On August 29, 1986, I served the within DECLARATION OF JOHN F. HAGGERTY IN SUPPORT OF OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

on the person(s) indicated below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

ZACHARY D. FASMAN, Esq.
LUTHER ZIEGLER, Esq.
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Los Angeles, California 90071

xxx—Federal—I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 29, 1986, at Los Angeles, California.

/s/ Anna Marie Schwaber
ANNA MARIE SCHWABER

BY JOHN HAGGERTY, ASSISTANT CITY ATTORNEY:

Yes. As and now the franchise dies March 31st.

BY MR. CUNNINGHAM:

And if there is an action before March 31, the Council can respond. Right?

BY MR. JOHN HAGGERTY:

Well, the Council would have to make the necessary finding by this Friday at the latest for the extension to go until the end of April. For it to go beyond the end of April, a second ordinance or new ordinance would also have to be passed and published by the end of this month.

BY MR. CUNNINGHAM:

So you are saying on Friday the Council could take action, that would still give a timely activity to the extension of the franchise.

BY MR. JOHN HAGGERTY:

Well, yes. Counsel has to make the necessary findings by this Friday at the latest to extend the franchise to April 31. For the franchise to be extended beyond that an ordinance would also have to be passed and published by the end o (sic) this month.

UNKNOWN

Well, I think . . .

BY MR. CUNNINGHAM:

Has this been clearly stated to the parties at odds in this matter?

BY MR. HAGGERTY:

It has been clearly tated (sic) to those people who have contacted me and asked me, yes.

BY MR. CUNNINGHAM:

So you don't know whether the parties at odds or not, you just know that theparties (sic), people who have contacted you, you have stated and made it clear to them. Mr. President, I think that the Council stil (sic) has time to act and on the other hand, the parties have time to act. And if there is good faith and there is reasonableness etween (sic) parties, then with the deadline of Friday staring them in the face, despite no matter how one person might want to charcterize (sic) us on the City Council, yes we do respond to pressure, we do respond to the concerns of those who are constituents of mie (sic), and I want to make it very clear that the minority drivers tend to be residents of my district, Lord knows what the kind of hings (sic) that are happening, they can't even get CETA jobs now. CETA closes March 31, so I don't know where to tell these guys to go except to try to bring the pressure to bear wherever we can to try to suggest to the owner that it would be wise for him tosit (sic) down with the union . . ., the parties and have it done, right?

BY MR. HAGGERTY:

As far as the finding goes.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 81-1519 AAH

GOLDEN STATE TRANSIT CORPORATION,
a California Corporation, doing business as
YELLOW CAB OF LOS ANGELES,
Plaintiff,

vs.

THE CITY OF LOS ANGELES, a Municipal Corporation,
Defendant.

STATEMENT OF GENUINE ISSUES

Date: September 15, 1986

Time: 10:00 A.M.

Courtroom: Hon. A. Andrew Hauk

Whether the City Council conditioned the renewal of the franchise on a settlement of the labor dispute.

DATED: August 29, 1986

Respectfully submitted,

JAMES K. HAHN
City Attorney
THOMAS C. BONAVENTURA
Senior Assistant City Attorney
JOHN F. HAGGERTY
Assistant City Attorney

By /s/ John F. Haggerty
JOHN F. HAGGERTY
Assistant City Attorney
Attorneys for Defendant
City of Los Angeles

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, say: I am a citizen of the United States and a resident of the County of Los Angeles. I am over the age of 18 years and not a party to the within action or proceeding. My business address is 1800 City Hall East, 200 North Main Street, Los Angeles, California 90012

On August 29, 1986, I served the within STATEMENT OF GENUINE ISSUES

on the person(s) indicated below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

ZACHARY D. FASMAN, Esq.
LUTHER ZIEGLER, Esq.
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WILLIAM B. CAMPBELL, Esq.
NICHOLAS DeWITT, Esq.
PAUL, HASTINGS, JANOFSKY & WALKER
555 South Flower Street
Twenty-second Floor
Los Angeles, California 90071

xx—Federal—I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 29, 1986, at Los Angeles, California.

/s/ Anna Marie Schwaber
ANNA MARIE SCHWABER

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV-81-1519 AAH (Gx)

GOLDEN STATE TRANSIT CORPORATION, *et al.*,
Plaintiffs,

vs.

THE CITY OF LOS ANGELES, a municipal corporation,
Defendants.

NOTICE OF ENTRY

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD:

You are hereby notified that ORD favor granting S/J on liability to pltf Golden State Transit Corp. agnst deft City of Los Angeles, but w/o any determination or jdmt on the issue of appropriate remedy if any there be in the above entitled case was entered in the docket on 9-19-86.

CERTIFICATE OF MAILING

I, Clerk of the United States District Court, Central District of California, and not a party to the within action, hereby certify that on 9-19-86, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

ZACHARY D. FASMAN
LUTHER ZEIGLER
CROWELL & MORING
1100 Connecticut Ave., N.W.
Washington, D.C. 20036

NICHOLAS DEWITT
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Los Angeles, CA. 90057

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13909 Magnolia Blvd.
Sherman Oaks, CA. 91423

Clerk, U.S. District Court

By Estrella Liberato
Deputy Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 81-1519 (CX)

GOLDEN STATE TRANSIT CORPORATION,
a California Corporation, doing business as
YELLOW CAB OF LOS ANGELES,
Plaintiff,

vs.

THE CITY OF LOS ANGELES, a Municipal Corporation,
Defendant.

MEMORANDUM OF DEFENDANT'S POINTS AND AUTHORITIES RE REMEDIES

Hearing Date: 10/20/86
Time: 10:00 a.m.
Courtroom: Hon. A. Andrew Hauk

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INTRODUCTION

The court has requested the parties to address the issue of applicable remedies in this case. There has been a declaration that the City could not condition the renewal of the plaintiff's franchise on its reaching a labor agreement with the union. It is apparently the plaintiff's position that it is entitled to damages pursuant to 42 U.S.C. 1983. The City's position is that damages are not available to the plaintiff but injunctive relief would be.

I.

THE REMEDY OF DAMAGES IS NOT AVAILABLE TO PLAINTIFF

A. *The Supreme Court Did Not Rule That the City Was Required To Grant The Franchise.*

The United States Supreme Court found that the City's conditioning the renewal of the franchise on the plaintiff reaching a labor agreement with the union was pre-empted. *Golden Transit v. City of Los Angeles*, 475 U.S. ——, 106 S.Ct. 1395, 1401, 89 L.Ed.2d 616 (1986). The court did not rule that plaintiff was entitled to a renewal of the franchise. But the plaintiff, if it suffered any monetary damages on this case, would have done so because of the non-renewal of the franchise. The court specifically stated, however:

> "Our holding does not require a city to refuse to renew any particular franchise. We hold only that a city cannot condition a franchise renewal in a way that intrudes into the collective bargaining process." 106 S.Ct., page 1401.

The City had contended, before the United States Supreme Court, that this case was moot because the franchise, if renewed, would have expired on March 31, 1985. The court rejected this argument (Footnote 3,

p. 1398) stating that if the franchise renewal had been granted in 1981, the petitioner would have faced a renewal procedure in 1985 rather than the more onerous task of obtaining a franchise through competitive bidding. The court went on to say that but for the non-renewal of 1981, Golden State would be more likely to have an operating franchise now. If the court had been of the opinion that the non-renewal of the franchise was a basis for damages that would have been a reason for finding that the case was not moot. The court, however, did not cite that as a reason.

B. *A Determination Of Pre-Emption Under The Supremacy Clause Will Not Support An Action Under Section 1983.*

The Court of Appeals, Ninth Circuit, in the case of *White Mountain Apache Tribe v. Williams* (8-5348) (*Daily Journal*, 9-24-86), attached hereto as Attachment "A", in an amended opinion, filed August 20, 1986, addressed the question of the applicability of Section 1983 to a case involving the Supremacy Clause.

In *White Mountain*, the Indian Tribe, which inhabits a reservation in Arizona, had organized a tribal enterprise to harbor timber. It entered into a contract with a logging company to provide logging operations on the reservation. The Arizona Highway Department and the Arizona Highway Commission assessed a motor carrier license tax and a use fuel tax against the logging company for activities it performed pursuant to the contract. The logging company paid the taxes under protest and then brought suit in the state court to recover them. Subsequently, the Indian Tribe agreed to reimburse the logging company for the assessed taxes. The tribe and the logging company brought suit in the federal court seeking a declaratory judgment and an injunction to prevent any further imposition of state taxes against the logging company. In their federal complaint, the

logging company and the tribe contended that federal law preempted the state tax laws and that the tax violated their rights to due process and equal protection. The case eventually went to the Supreme Court.

The United States Supreme Court, in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136; 101 S.Ct. 2578; 65 L.Ed.2d 665 (1980) ruled that the Arizona state taxes were preempted because there was a comprehensive federal regulatory scheme governing the harvest and sale of tribal timber and the state taxes would interfere with these federal goals and policies. 24 U.S.C. 406 provides that any proceeds from timber sales be paid to the tribe "or disposed of for its benefit" subject only to limited deductions for "administrative expenses incurred by the federal government." The court found that the economic burden of the tax would ultimately fall on the Tribe. 100 S.Ct. at p. 2507-2588. The logging company and the Indian Tribe then sought attorneys fees pursuant to Section 1983. The District Court granted these fees and the Court of Appeals, in a 2-1 decision, reversed.

The Court of Appeals stated that the United States Supreme Court had never directly addressed the question of whether the Supremacy Clause creates "rights, privileges or immunities" within the ambit of 1983. Attachment "A", p. 14. The Court of Appeals went on to say that the Supreme Court had held that the Supremacy Clause is not a substantive constitutional provision that creates rights within the meaning of 28 U.S.C. 1343(3), citing *Chapman v. Houston Welfare Rights Association*, 441 U.S. 600, 612. The Court of Appeals, based on the rationale of *Chapman*, concluded that:

> "[T]he Supremacy Clause, standing alone, 'secures' federal rights only in the sense that it establishes federal and state priorities; it does not create individual rights, nor does it secure rights within the meaning of Section 1983." Attachment "A", p. 14.

The court added:

> "We thus come down on the side of the weight of authority that preemption of state law under the Supremacy Clause—at least if based on federal occupation of the field or conflict with federal goals—will not support an action under Section 1983, and will not, therefore, support a claim of attorney's fees under 1988."
>
> Attachment "A", p. 15.

The Supreme Court, in *Golden State*, 106 S.Ct. at p. 1398(2), announced the applicable pre-emption principle in that case, the so-called *Machinist* rule. This principle precludes state and municipal regulation "concerning conduct that Congress intended to be unregulated." The court concluded that the City's action contravened that intent (p. 1399(3)). It is fair to say that Congressional intent can be equated to a federal goal. Consequently, the fact that the City's action has been found to have been pre-empted pursuant to the Supremacy Clause does not support an action under 1983.

C. *Plaintiff Is Not Entitled To Any Damage For An Alleged Violation Of A Federal Statute.*

The question was asked by this Court, at the hearing of September 15th, as to whether plaintiff was entitled to damages for a violation of a federal statute, apparently under the rule of the case of *Maine v. Thiboutot*, 448 U.S. 1; 100 S.Ct. 2502; 65 L.Ed. 558.

The Court of Appeals, in *White Mountain Apache Tribe*, did discuss the applicability of 42 U.S.C. 1983, based on the case of *Maine v. Thiboutot*. In *Maine*, the United States Supreme Court ruled that certain persons allegedly denied welfare benefits could bring a 1983 action based on the Federal Social Security Act, Section 42 U.S.C. 602(a)(7) which provided that, with certain exceptions, the state agency shall, in determining need, take into consideration certain factors in determining

whether aid for dependent children should be provided. The plaintiffs contended that the State of Maine, contrary to the statute, was improperly considering certain factors resulting in loss of welfare benefits to them. The Supreme Court, in *Thiboutot*, held that a 1983 remedy included violations of federal statutory, as well as constitutional, law.

1. The plaintiff has abandoned, or waived, any issue as to whether it is entitled to damages under Section 1983 for an alleged violation of a federal statute.

Summary judgment has been entered in this case, based on plaintiff's motion, as to the issue of liability. The judgment, findings and conclusions of law make no reference to an alleged violation of a federal statute resulting in a Section 1983 cause of action. Plaintiff, in its petition for certiorari to the United States Supreme Court, did not indicate such being an issue. (Page 5 of the petition is attached hereto as Attachment "B", p. 17.) Such an allegation is not presently an issue in this case, having been abandoned, or waived, by plaintiff.

2. The City's non-renewal of the franchise did not violate any federal statute.

Assuming, arguendo, there is a Section 1983 issue it is the non-renewal of the taxicab franchise which would be the alleged cause of plaintiff's monetary damages. Yet there is certainly no federal statute which requires that the City renew a franchise.

The plaintiff does not have a cause of action, therefore, pursuant to Section 1983.

3. The City's conditioning the renewal of the franchise on a settlement of the strike did not violate any federal statute.

The Supreme Court, in *Golden State*, did not find that the City had violated any specific section of the National

Labor Relations Act. The majority opinion of the Court of Appeals, in *White Mountain Apache Tribe*, finding that plaintiffs had no enforceable rights under Section 1983, even though the federal regulatory scheme may have been designed to benefit the Tribe (Attachment "A", p. 15), stated, in Footnote 8:

> "Section 1983, as interpreted by *Thiboutot* and its progency, enforces federal statutory rights only against direct violations of the federal statute in question."
>
> Attachment "A", p. 18.

The Supreme Court, in *Golden State*, did say on pages 1399-1400 of 106 S.Ct. that the condition imposed by the City did *contravene congressional interest* and cited 29 U.S.C. Section 158(d). Section 158, however, defines what is an unfair labor practice; either by an employer or a labor organization or its agents. Included among the activities which can constitute an unfair labor practice is the refusal to bargain collectively.

Subsection (d) provides that "such obligation (the obligation to bargain collectively) does not compel either party to agree to a proposal or require the making of a concession." This language only provides that the refusal to agree to a proposal or to make a concession is not an unfair labor practice. That is all that it says. It does not say that it is an unfair labor practice to attempt to force one to agree to a concession. Furthermore, Section 158 neither forbids nor mandates any action by the City.

In *Maine v. Thiboutot*, the Maine Court had found that there was a violation of 42 U.S.C. 602(a)(7), 405 A.2d 230, 235(6) (1979). This section specifically mandated the State to consider certain factors in determining aid to dependent children. The State was found to have improperly considered income received by the plaintiff re-

sulting in a reduction of aid. The State was in direct violation of the federal statute.

The United States Supreme Court, in the case of *Pennhurst State School v. Halderman*, 451 U.S. 28; 101 S.Ct. 1531; 67 L.Ed.2d 694 (1981) stated that *Maine v. Thiboutot* held that Section 1983 provides a cause of action for state deprivations of "rights secured" by "the laws" of the United States. 101 S.Ct. at p. 1545. This case involved the Developmentally Disabled Assistance and Bill of Rights Act which established a federal-state grant program whereby the federal government provided financial assistance to participating states to aid them in creating programs to care for and treat the developmentally disabled. The "bill of rights" provision of the Act, Section 6010, stated that the mentally retarded have a right to appropriate treatment. Plaintiff, a retarded resident of the state capitol, brought a class action contending conditions at the hospital were unsanitary, inhumane and dangerous.

The initial question the court asked was whether Section 6010 of the Act created enforceable rights and obligations. 101 S.Ct. at p. 1538. The court found that it did not stating that the Act only encouraged state treatment and did not mandate it. P. 1545. The court concluded that the Section did not confer substantive rights and thus plaintiffs did not have a cause of action pursuant to Section 1983. P. 1545, Footnote 21.

The language of Section 158 likewise creates no obligation on the part of the City. It secures no substantive right as against the City so as to allow for a Section 1983 action. The City's action may have frustrated effective implementation of the NLRA's process (106 S.Ct. at p. 1399(2)) so that its action was pre-empted. To say, as the Supreme Court said, that the City's action contravened congressional interest allows for a finding of pre-emption. That is what pre-emption, by definition, is. But the City's action was not in "actual conflict with the

explicit provisions of federal law." (Emphasis added.) *White Mountain Apache Tribe*, Footnote 7. Attachment "A", p. 18.

The dissent, in the *White Mountain Apache* case, cites the case of *Keaukaha-Panaewa Community v. Hawaiian Homes*, 739 Fed.2d 1467 (Ninth Circuit-1984). This was a case where the Ninth Circuit, Court of Appeals, found that the plaintiffs could state a Section 1983 action. In that case, native Hawaiians filed a class action alleging that the County's use of Hawaiian Homelands for a flood control project violated the Hawaiian Admission Act which mandated that certain lands, designated the Hawaiian Home Lands, be held in trust for the benefit of native Hawaiians and Section 4 of the Hawaiian Admission Act required the provisions of the Commission Act be incorporated in the Constitution of the State. The incorporation was described "as a compact with the United States." The Admission Act reiterated the state's obligation to hold the lands in trust and retain the right of federal government intervention to protect the trust. Page 1469.

The court, in that case, stated:

> "While the management and disposition of the home lands was given over to the State of Hawaii with the incorporation of the Commission Act into the State Constitution, the trust obligation is rooted in federal law, and power to enforce that obligation is contained in federal law. Congress imposed the trust obligation as a condition of statehood and as a 'compact with the United States.'"

In that case the federal law specifically imposed an obligation on the state to hold the lands in trust. The action of the county in that case constituted action of the state, counties being political subdivisions of the state. *No. Colo. Water, etc. v. Bd. of City Commissioners*, 482 F.Supp. 1115, 1118 (D. Colo. 1980).

No obligations were imposed upon the City by Section 158. Consequently, here was no obligation to violate.

II.

INJUNCTIVE RELIEF WOULD BE THE APPROPRIATE RELIEF IN THIS SECTION

Since the City was pre-empted from conditioning the renewal of the franchise upon a settlement of the strike the City would certainly appear to be obligated to reconsider the renewal. Consequently, the appropriate remedy would at least be for the court to enjoin the City to reconsider its action.

In the granting of injunctions the court does have broad and flexible equitable powers. *Collum v. Edwards*, 578 Fed.2d 110, 112(2) (Fifth Circuit—1978). The court may feel it is appropriate in the exercise of such power to enjoin the City to grant plaintiff a franchise for four years (the proposed term of the one not renewed) under the same terms and conditions of present franchises.

III.

ANY MEASURE OF DAMAGES WOULD BE NET PROFITS LOST

Plaintiff, as has been stated, is not entitled to any monetary damages for reasons stated. As has been said any monetary damages plaintiff may have allegedly incurred would have been from the non-renewal of the franchise. But the Supreme Court did not find that the City was required to grant the franchise. Undoubtedly, plaintiff, in its opening brief, will contend it is entitled to damages. If the court should rule that plaintiff can assert a claim for damages the most analogous type of remedy would appear to be that which is available for a breach of contract, though there was no breach of contract here. In California the rule in a breach of contract case is the loss of profits which can be proven with reasonable certainly both as to their occurence and the extent thereof. *Fisher v. Hampton*, 44 Cal.App. 3d 741, 748(2-3) ; 118 Cal.Rptr. 811 (1975).

Plaintiff's franchise, if extended, would have terminated March 31, 1985. Plaintiff, as a result of the granting of the preliminary injunction, was able to continue to operate until April, 1983. Any measure of damages therefore would be for an approximate two year period.

CONCLUSION

Plaintiff is not entitled to any remedy of damages in this action but only to injunctive relief.

DATED: October 6, 1986

JAMES K. HAHN
City Attorney
THOMAS C. BONAVENTURA
Senior Assistant City Attorney
JOHN F. HAGGERTY
Assistant City Attorney

By /s/ John F. Haggerty
JOHN F. HAGGERTY
Assistant City Attorney
Attorneys for Defendant
City of Los Angeles

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, say: I am a citizen of the United States and a resident of the County of Los Angeles. I am over the age of 18 years and not a party to the within action or proceeding. My business address is 1800 City Hall East, 200 North Main Street, Los Angeles, California 90012

On October 6, 1986, I served the within MEMORANDUM OF DEFENDANT'S POINTS AND AUTHORITIES RE REMEDIES

on the person(s) indicated below, by placing a true copy thereof enclosed in a sealed envelope for delivery by Federal express in the United States mail at Los Angeles, California, addressed as follows:

ZACHARY D. FASMAN
LUTHER ZIEGLER
CROWELL & MORING
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

x—Federal—I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 6, 1986, at Los Angeles, California.

/s/ Anna Marie Schwaber
ANNA MARIE SCHWABER

DECLARATION OF PERSONAL SERVICE

The undersigned hereby declares: that I am a citizen of the United States and a resident of the County of Los Angeles; that I am over the age of eighteen (18) years and am not a party to the within action or proceeding; that my business address is 1800 City Hall East, 200 North Main Street, Los Angeles, California 90012; that on the 6th day of October, 1986, I served the within MEMORANDUM OF DEFENDANT'S POINTS AND AUTHORITIES RE REMEDIES on the defendant in said action or proceeding by personally serving a true copy thereof on the defendant, or his/her attorney(s) of record, whose address is as follows:

WILLIAM B. CAMPBELL
NICHOLAS DeWITT
PAUL, HASTINGS, JANOFSKY & WALKER
555 South Flower Street
Twenty-Second Floor
Los Angeles, California 90071

X—Federal—I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 6, 1986, at Los Angeles, California.

JOHN F. HAGGERTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case #CV-81-1519-AAH-(Gx)

GOLDEN STATE TRANSIT CORPORATION,
a California Corporation, doing business as
YELLOW CAB OF LOS ANGELES,
Plaintiff,

v.

THE CITY OF LOS ANGELES, a Municipal Corporation,
Defendant.

INTERIM JUDGMENT FOR INJUNCTION

[Filed Apr. 23, 1987]

This matter having come on regularly for hearing before the Honorable A. Andrew Hauk, United States District Judge, on October 20, 1986, and the Court having fully considered the pleadings, and points and authorities submitted by counsel for the parties, and the arguments made by counsel at the October 20, 1986 hearing, and good cause appearing;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That defendant City of Los Angeles shall forthwith grant and award to plaintiff Golden State Transit Corporation a franchise to operate a fleet of 400 taxicabs within the City of Los Angeles for a four-year term.

2. That plaintiff Golden State Transit Corporation shall be given a reasonable time, not less than six months

nor more than one year from the date of entry of a final judgment in this matter, in which to commence its taxicab operation before the four-year franchise term begins to run.

3. That defendant City of Los Angeles shall not revoke, suspend, interfere with, or fail to renew the franchise granted and awarded to Plaintiff Golden State Transit Corporation pursuant to the written Decision, Order and the Interim Judgment for any reason relating to Golden State Transit Corporation's collective bargaining relationship with its employees on the basis of any condition or circumstances relating to the preempted conduct of the City of Los Angeles.

4. That plaintiff Golden State Transit Corporation shall not recover compensatory damages from the City of Los Angeles pursuant to 42 U.S.C. Section 1983.

5. That plaintiff Golden State Transit Corporation shall be awarded monetary relief ancillary to and in furtherance of the injunction issued herein by the Court, in an amount equal to the salvage value of Golden State Transit Corporation's taxicab franchise on March 23, 1981. The exact amount of said salvage value shall be determined upon trial by the Court, sitting without a jury, said trial to be scheduled at such time as the appellate remedies available to the parties in this matter have been exhausted.

DATED: APRIL 23, 1987

/s/ A. Andrew Hauk
A. ANDREW HAUK
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case #CV-81-1519-AAH-(Gx)

GOLDEN STATE TRANSIT CORPORATION,
a California Corporation, doing business as
YELLOW CAB OF LOS ANGELES,
Plaintiff,

v.

THE CITY OF LOS ANGELES, a Municipal Corporation,
Defendant.

DECISION AND ORDER

[Filed Apr. 23, 1987]

APPEARANCES:

CROWELL & MORING, Washington, D.C., by Zachary D. Fasman, Esq. and Luther Ziegler, Esq., and PAUL, HASTINGS, JANOFSKY & WALKER, Los Angeles, California, by Nicholas DeWitt, Esq., Attorneys for Plaintiff.

CITY OF LOS ANGELES, James K. Hahn, Esq., City Attorney, by John F. Haggerty, Esq., Assistant City Attorney.

This matter came on for hearing before the Court on October 20, 1986 following the issuance of an opinion by the United States Supreme Court, *Golden State Transit Corp. v. City of Los Angeles*, —— U.S. ——, 106 S.Ct. 1395 (1986), reversing the decision of the Ninth

Circuit Court of Appeals in this matter, *Golden State Transit Corp. v. City of Los Angeles*, 754 F.2d 830 (9th Cir. 1986), *cert. granted* —— U.S. ——, 105 S.Ct. 3475 (1985), and remanding the case for further proceedings consistent with the Supreme Court opinion, and pursuant to the filing and spreading by this Court of the mandate of the Ninth Circuit Court of Appeals, directing this Court to undertake further proceedings not inconsistent with the Supreme Court opinion.

The Court, having fully considered the points and authorities and proposed orders submitted by counsel for the parties, and the lengthy arguments presented by counsel at the October 20, 1986 hearing, and good cause appearing, hereby issues its Decision and Order herein.

I. BACKGROUND AND PROCEDURAL HISTORY

This case arises out of the conduct of defendant City of Los Angeles ("City") in interjecting itself into a labor dispute between plaintiff Golden State Transit Corporation ("Golden State") and its taxicab drivers in 1981 by refusing to renew Golden State's taxicab franchise until Golden State settled the labor dispute with its drivers. Since that time, this case has had a complex, and sometimes tortured, procedural history culminating now in this decision and order by the Court.

In 1980, Golden State was the largest taxicab company in Los Angeles, operating approximately 400 cabs. On March 30, 1980, Golden State—along with twelve other taxi companies operating in Los Angeles—applied for renewal of its franchise, scheduled to expire on October 29, 1980. Subsequent to the applications for renewal, the Los Angeles City Council extended all taxi franchises to March 31, 1981 to allow for an evaluation of the City's overall taxicab situation and a recommendation as to renewal by the City's Board of Transportation Commissioners.

On September 4, 1980, the City's Board of Transportation Commissioners recommended the renewal of Golden State's franchise. Meanwhile, in October 1980—while Golden State's franchise application was awaiting further evaluation and approval by the City Council—Golden State's collective bargaining agreement with its Teamster drivers expired. In order to allow operations to continue during negotiations for a new agreement, Golden State and its drivers signed an interim collective bargaining agreement. The interim agreement was to expire on February 10, 1981, the day before the full City Council was scheduled to act on the franchise renewal applications.

On February 2, 1981, the City Council's Transportation and Traffic Committee endorsed the franchise renewals recommended by the Board of Transportation Commissioners. The Committee's report stated that Golden State and five other companies were in full compliance with all terms and conditions for franchise renewal.

On February 11, 1981, the interim collective bargaining agreement between Golden State and its drivers expired and the drivers went out on strike. As scheduled, the City Council met on that date to consider the franchise renewal applications. A Teamster representative appeared at the February 11 City Council meeting and argued that Golden State's franchise should not be renewed because of the pending labor dispute. The City Council approved the renewal applications of the five other franchises whose applications had been endorsed by the Transportation Committee and postponed consideration of Golden State's application until February 17, 1987.

At the February 17 meeting, the City Council—after again hearing the opposition of the Teamsters to approval of Golden State's franchise—granted Golden State a franchise extension to April 30, 1981 but only on

the condition that the City Council expressly find on or before March 27, 1981 that such franchise extension was in the best interest of the City.

On March 23, 1981, the City Council met to consider whether it was in the best interest of the City to grant the 30-day franchise renewal to Golden State. The ongoing strike by Golden State's drivers was the predominant theme of the meeting. The City Council heard testimony from representatives of the Teamsters regarding the labor dispute. Several council members made pro-union comments during the meeting including the council president, who remarked that "it will be very difficult to get this ordinance passed . . . if the labor dispute is not settled by the end of the week." At the conclusion of the meeting, the City Council defeated a motion that the Council find that an extension of Golden State's franchise would be in the best interest of the City. Golden State's franchise thus was due to expire by its terms on March 31, 1981.

Golden State then filed the present action, seeking declaratory and injunctive relief and damages pursuant to 42 U.S.C. Section 1983 on the grounds that the City's action was preempted by the National Labor Relations Act ("NLRA") and violated Golden State's rights to due process of law and equal protection. On March 30, 1981, this Court granted Golden State's application for a temporary restraining order and on April 13, 1981, the Court issued a preliminary injunction against the City on the grounds that the City's action in conditioning the renewal of Golden State's franchise on its settlement of the labor dispute was preempted by the NLRA. *Golden State Transit Corp. v. City of Los Angeles*, 520 F. Supp. 191 (D.C. Cal. 1981).

On appeal, the Ninth Circuit Court of Appeals vacated this Court's preliminary injunction, holding that because use of the streets and highways was a "traditionally local matter" reserved to state and local regulation under the

police power, Golden State had little chance of prevailing on the merits of the preemption question. *Golden State Transit Corp. v. City of Los Angeles*, 686 F.2d 758 (9th Cir. 1982). The United States Supreme Court denied Golden State's petition for a writ of certiorari. *Golden State Transit Corp. v. City of Los Angeles*, 459 U.S. 1105 (1983).

While the above appeal was pending, the case was reassigned to then District Judge Cynthia Holcomb Hall pursuant to an order of the District Court Judge dated December 7, 1981, creating a calendar for Judge Hall. On March 28, 1983, after Judge Hall filed and spread the mandate of the Ninth Circuit vacating the preliminary injunction issued by this Court, Golden State filed an amended complaint repeating its original causes of action and adding an additional cause of action alleging violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. On April 28, 1983, Judge Hall denied Golden State's application for a preliminary injunction and granted the City summary judgment on the Sherman Act claim. *Golden State Transit Corp. v. City of Los Angeles*, 563 F. Supp. 169 (C.D. Cal. 1983). On appeal, the Ninth Circuit affirmed Judge Hall on the Sherman Act claim. *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984). The Supreme Court denied Golden State's petition for a writ of certiorari on the Sherman Act issues. *Golden State Transit Corp. v. City of Los Angeles*, 471 U.S. 1003 (1985).

While Golden State's appeal on the Sherman Act issues was pending, Judge Hall, in an unpublished decision, granted the City summary judgment on Golden State's remaining claims, holding that the City's conduct was not preempted by the NLRA and that Golden State did not allege a sufficient constitutionally protected property interest to give rise to a claim for violation of its due process rights.[1] The Ninth Circuit affirmed Judge Hall

[1] Golden State abandoned its equal protection claim.

on both points. *Golden State Transit Corp. v. City of Los Angeles*, 754 F.2d 830 (9th Cir. 1985). The Supreme Court then granted Golden State's petition for a writ of certiorari, —— U.S. ——, 105 S. Ct. 3475 (1985), and reversed the Ninth Circuit ruling on the preemption question. *Golden State Transit Corp. v. City of Los Angeles*, —— U.S. ——, 106 S. Ct. 1395 (1986).

In reversing the Ninth Circuit, the Supreme Court relied on the so-called "Machinists" preemption doctrine, based on its decision in *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), which precludes state and municipal regulation of conduct that Congress intended to remain unregulated. The Court emphasized that the NLRA was purposefully structured by Congress to insure that the collective bargaining process was to be regulated only by "'"the free play of economic forces."'" 106 S. Ct. at 1398 (quoting *Machinists*, 427 U.S. at 140 (quoting in turn *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971))).

Agreeing with this Court's finding that the City had conditioned renewal of Golden State's franchise on its settlement of the labor dispute, the Court held that the City's conduct was preempted under *Machinists* because it imposed a "positive durational limit" on the labor dispute and thereby "destroyed the balance of power designated by Congress, and frustrated Congress' decision to leave open the use of economic weapons." 106 S. Ct. at 1399-1401.

On remand, the case was returned to this Court for disposition in view of Judge Hall's elevation to the Ninth Circuit Court of Appeals. On September 15, 1986, this Court granted Golden State summary judgment on the issue of the City's liability, holding that, pursuant to the Supreme Court decision, the City's conduct in interfering with Golden State's labor dispute was preempted by the NLRA. Thus, the sole issue remaining for resolution by this Court is the nature and extent of the remedy

and relief to which Golden State is factually and legally entitled.

II. NATURE AND EXTENT OF GOLDEN STATE'S REMEDY

A. INJUNCTIVE AND EQUITABLE RELIEF

Both Golden State and the City agree that some form of injunctive relief is appropriate here. Golden State proposes that the Court order the City to award Golden State a franchise to operate a taxicab business for a ten-year term upon the same general terms and conditions as other taxicab franchises.[2] In addition, Golden State asks the Court to enjoin the City from revoking, suspending or failing to renew Golden State's franchise for any reason relating to its collective bargaining relationship with its employees. The City, on the other hand, proposes that it grant Golden State a taxicab franchise for four years on such terms and conditions as other taxicab franchises, and that Golden State be given a reasonable time to commence operations.

Mandatory injunctive relief of the type sought here is an extraordinary remedy that should be granted only under compelling circumstances and in a limited manner to restore the status quo. *See Committee of Central American Refugees v. I.N.S.*, 795 F.2d 1434, 1441 (9th cir. 1986); *Perez-Funez v. District Director, I.N.S.*, 611 F. Supp. 990, 1001 (C.D. Cal. 1984); 7-Part 2 J. Moore, J. Lucas & K. Sinclair, Jr., Moore's Federal Practice para. 65.04[1]; 42 Am. Jur. 2d Injunctions §§ 16, 20. In light of this standard, the Court is of the view that

[2] Golden State argues that a ten-year franchise term is necessary in order to allow it ample opportunity to establish a profitable business that complies with all franchising requirements. Golden State also argues that a ten-year franchise term will give the City adequate time for investigation should Golden State apply to transfer ownership of the franchise.

the injunction proposed by the City is the more appropriate one. When the City engaged in its preempted conduct in March 1981, Golden State was operating a fleet of approximately 400 taxicabs under an expiring four year franchise, renewable for another four years. Thus, to restore that status quo, it is appropriate to enjoin the City to award Golden State a new franchise to operate a fleet of 400 taxicabs for a four-year term. In addition, in the interest of fairness to Golden State and in view of the lapse of time since Golden State last operated a taxicab fleet, the Court should further order that Golden State be given a reasonable time, not less than six months nor more than one year from the date of entry of a final judgment in this matter, to commence its taxicab operation under the new four-year franchise. Finally, in accordance with views expressed in the opinion of the Supreme Court, the Court should also issue a corresponding prohibitory injunction barring the City from revoking, suspending, interfering with, or failing to renew Golden State's franchise for any reason related to its collective bargaining relationship with its employees or on the basis of any condition.

Golden State also asks the Court to order that the franchise awarded to it may be sold, leased, assigned, transferred or otherwise alienated without restriction other than that the City may ensure that any proposed new operator of the franchise is of good moral character. Golden State argues that if the City is given absolute veto power over a transfer of ownership, such power will effectively destroy the value of the franchise.

This Court agrees with the City's position that a grant to Golden State of a franchise that is transferable without any restrictions whatsoever would constitute relief in excess of what is equitable, and would place Golden State in a better position than it had (i.e. the status quo) in March 1981. The Court finds that the Los Angeles City Ordinance allowing assignment or transfer

of a franchise with the consent of the City Council, but only conditioned on good moral character of the franchisee, is a necessary and fair condition to the grant of a new franchise and that requiring the City's consent with this condition will not prejudice Golden State's rights or affect the value of its new franchise. Further, the Court notes that California law fully and adequately protects Golden State against any unreasonable or arbitrary refusal to consent to a transfer of ownership by the City. *See Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488 (1985).

B. *MONETARY RELIEF*

Golden State also argues that it is entitled to monetary relief by virtue of the fact that the City's wrongful interference in its labor dispute effectively forced it out of business. Golden State bases its claim for monetary relief on two grounds. First, Golden State asserts that pursuant to 42 U.S.C. Section 1983, it may be compensated in damages for the City's violation of both the United States Constitution's supremacy clause and the NLRA. Second, Golden State contends that even if compensatory damages are not appropriate in this case, the Court may nevertheless award monetary relief ancillary to its injunction to fully restore the status quo and to give "meaningful effect" to the injunction. Each of Golden State's arguments will be addressed in turn below.

1. *COMPENSATORY DAMAGES*

a. *Supremary clause "violation"*

As discussed above, the essence of the Supreme Court's latest ruling in this case is that the City's conduct in conditioning renewal of Golden State's franchise on settlement of its labor disputes was in contravention of congressional intent in enacting the NLRA, namely to leave the collective bargaining process solely to the parties involved and to protect the free use of economic weapons

by those parties. *See* —— U.S. at ——, 106 S. Ct. at 1400. Accordingly, the Supreme Court held that that the supremacy clause of the United States Constitution, U.S. Const. art. VI cl. 2, preempted the City's action. Golden State now claims that the City's "violation" of the supremacy clause entitles it to damages under 42 U.S.C. Section 1983, which provides a cause of action for a deprivation, under color of state law, "of any rights, privileges or immunities secured by the Constitution and laws." [3] Golden State's argument raises the fundamental constitutional question of whether the supremacy clause, which serves as a protection against the intrusion of state law into the sphere of federal power, may also be used as a "sword" in bringing an action for damages pursuant to Section 1983. In other words, this Court must decide whether the supremacy clause creates federally-protected rights, the deprivation of which may be redresed by a damages action under Section 1983.

In its recent decision in *White Mountain Apache Tribe v. Williams*, 798 F.2d 1205 (9th Cir. 1986), *withdrawn* and *amended*, 810 F.2d 844 (9th Cir.), *cert. denied*, 107 S. Ct. 940 (1987), the Ninth Circuit expressly held that the preemption of state law under the supremacy clause will not support a cause of action under Section 1984. In *White Mountain*, the plaintiffs were awarded attorneys fees pursuant to the Civil Rights Attorneys Fees

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[3] 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Act, 42 U.S.C. § 1988, after the United States Supreme Court ruled that state taxes imposed on plaintiffs by the State of Arizona were preempted by the supremacy clause.[4] The Ninth Circuit, relying on the United States Supreme Court decision in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979),[5] reversed the attorneys fees award and held that preemption under the supremacy clause, standing alone, does not give rise to a claim cognizable under Section 1983, explaining:

> [T]he Supremacy Clause, standing alone, "secures" federal rights only in the sense that it establishes federal-state priorities; it does not create individual rights, nor does it "secure" such rights within the meaning of § 1983.
>
> The primary function of the Supremacy Clause is to define the relationship between state and federal law. It is essentially a power conferring provision, one that allocates authority between the national and state governments; thus, it is not a rights conferring provision that protects the individual against government intrusion.
>
> • • • •
>
> We thus come down on the side of the weight of authority that preemption of state law under the Supremacy Clause—at least if based on federal occupation of the field or conflict with federal goals—will not support an action under § 1983. . . .

[4] The Civil Rights Attorneys Fees Act, 42 U.S.C. § 1988, provides in part that the prevailing party in a Section 1983 action may recover a reasonable attorneys fee as part of costs.

[5] In *Chapman v. Houston Rights Organization*, 441 U.S. 600 (1979), the Supreme Court held that an allegation of the preemption of state law under the supremacy clause does not confer jurisdiction on the Federal Courts under 28 U.S.C. § 1343(3), which provides federal jurisdiction for claims commenced "[t]o redress the deprivation, under color of state law . . . of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights."

> cupation of the field or conflict with federal goals—will not support an action under § 1983. . . .

810 F.2d at 848, 850. *See also Pirolo v. City of Clearwater*, 711 F.2d 1006 (11th Cir. 1983) (preemption of city airport noise ordinances will not support an action for damages under Section 1983); *see generally* J. Choper, *Judicial Review in the National Political Process*, 174-75 (1980) (discussing the differences between violation of the federalism provision of the Constitution and violation of the individual rights secured by the Constitution).

Golden State attempts to distinguish the *White Mountain* decision by relying on language contained in a footnote in that decision. In the footnote, the Ninth Circuit stated that in holding that the supremacy clause did not support a Section 1983 cause of action on the facts before it, it was deliberately not deciding the question of whether a Section 1983 cause of action would exist where a state law was preempted because of an actual direct conflict with the explicit provisions of the federal law. 810 F.2d at 850 n.8. Golden State argues that here in this case, the City's action was in direct conflict with Section 8(d) of the NLRA, 29 U.S.C. § 158(d).[6] Thus, Golden State contends that the *White Mountain* decision does not apply to this case inasmuch as the preemption of the City's conduct was a preemption because of actual

[6] Section 8(d), 29 U.S.C. § 158(d), provides in relevant part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating an agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

conflict with the NLRA, not a preemption because of a federal occupation of the labor field.

Golden State's argument is unpersuasive. Contrary to Golden State's assertion, this is not a case where the City's conduct was preempted because it was in "actual conflict" with the "explicit provisions" of Section 8(d). Rather, as the Supreme Court made clear in its opinion in this case, the City's conduct was preempted because it constituted regulation in an area that, in the interest of a balanced federal labor policy, Congress intended to remain unregulated. —— U.S. ——, 106 S.Ct. at 1398-99. As such, the *White Mountain* decision is squarely on point. There, as here, the preemption was based on federal occupation of the field and not conflict between the challenged state law and a specific federal statute. *See* 810 F.2d at 850 n.8. The only difference between our case here and *White Mountain* is that in *White Mountain* Congress occupied the field of Indian timber rights through affirmative regulation whereas here in this case Congress has occupied the field of collective bargaining by mandating that it remain "unregulated." *See Golden State*, —— U.S. ——, 106 S.Ct. at 1398. This is a distinction without a difference and does not persuade the Court to disregard the plain holding in *White Mountain*. In light of the clear statement of the Ninth Circuit as to the proper role of the supremacy clause in our constitutional jurisprudence, the Court finds the supremacy clause does not create individual rights that may be vindicated in an action for damages under Section 1983. Accordingly, the Court must, and does, refuse to award Golden State compensatory damages based on the preemption of the City's conduct under the supremacy clause.[7]

[7] Golden State, citing the Supreme Court decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), argues that it is also entitled to damages pursuant to the Court's "inherent authority to remedy unconstitutional conduct." The Court rejects this argument. *Bivens* offers no support for Golden State's position, since it involved a violation of the fourth amendment, a constitutional provision that clearly creates individual rights. Further, the Court is aware of no case which has extended the rationale of *Bivens* to provide a cause of action for damages under the federal common law based solely on a violation of the Supremacy Clause. Indeed, the very cases cited by Golden State involved constitutional provisions which secure individual rights rather than provisions analogous to the Supremacy Clause. *See Fact Concerts, Inc. v. City of Newport*, 626 F.2d 1060 (1st Cir. 1980) (licensee's first amendment rights violated), *punitive damages vacated*, 453 U.S. 247 (1981); *Herz v. Degnan*, 648 F.2d 201 (3d Cir. 1981) (psychologist's fifth amendment right in professional license). In view of the clear and well reasoned view of the Ninth Circuit in *White Mountain* as to the proper role of the supremacy clause in our constitutional framework, any award of damages by this Court made solely on the basis of some nebulous notion of this Court's "inherent power to do justice" would be an unwarranted and unsupportable extension of both existing law and of this Court's jurisdiction. This the Court will not do.

(b) *NLRA "violation"*

Golden State also argues that it has a right to compensatory damages under Section 1983 by virtue of the City's "violation" of the NLRA. According to Golden State, the City's intervention into Golden State's labor dispute deprived Golden State of its collective bargaining rights under the NLRA and therefore deprived it of a right secured by the laws of the United States within the meaning of Section 1983.

Section 1983 provides a broad right of action in damages to remedy federal statutory violations. *Maine v. Thiboutot*, 448 U.S. 1 (1980). However, not every violation of a federal statute will support a Section 1983 cause of action. Rather, two distinct criteria must be satisfied for a federal statutory violation to give rise to a Section 1983 cause of action. First, the statute at issue must create a federal right in the plaintiff properly enforceable under Section 1983. Second, Congress must not have foreclosed a Section 1983 action by the terms of the statute itself. *See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Penn-*

hurst State School and Hospital v. Halderman, 451 U.S. 1 (1980).

Golden State's claim for compensatory damages cannot satisfy either of these criteria. In the first place, it is well settled that the *Thiboutot* line of cases allows a Section 1983 cause of action based on a federal statutory violation only where there has been a *direct violation* of the statute in question. *See White Mountain Apache Tribe v. Williams*, 810 F.2d at 851 n.9. Such is not the case here. As the City correctly notes, it did not, and could not, violate the NLRA, or Section 8(d) specifically, since it was not a party to the collective bargaining agreement between Golden State and its Teamster drivers but rather was merely a collateral third party to the collective bargaining process. Section 8(d) of the NLRA does not create rights and obligations with respect to third parties who are not parties to a collective bargaining agreement but who, in some way, come in contact with the collective bargaining process. Rather, Section 8(d) defines the concept of collective bargaining and the obligations of the parties engaged in collective bargaining, and, in the language at issue in this case, states that the failure to make a concession during collective bargaining negotiations is not an unfair labor practice. Thus, while the Supreme Court in this case relied on Section 8(d) in holding that the City's action was preempted because it would have the effect of forcing a bargaining concession by Golden State, it would strain the language and purpose of the NLRA and misconstrue the import of the Supreme Court opinion to find that the City "directly violated" Section 8(d) solely by virtue of the fact that it took some action preempted by that section. This case does not present a situation where the City, under color of state law, took some action which violated a federal statute securing an *individual right* in Golden State. Instead, the Supreme Court ruling here in our case—as was the Ninth Circuit's ruling in *White Mountain*—is grounded on considerations of governmental power and

the division of authority between the states and the federal government. Accordingly, Golden State's Section 1983 claim, based on the City's alleged violation of the NLRA, does not satisfy the first prong of the *Thiboutot-Pennhurst-Middlesex County* test.

Assuming, *arguendo*, that the facts of this case could be stretched to conclude that the City violated Section 8(d), Golden State still cannot state a cause of action for damages under Section 1983 since it is clear that the protections of the NLRA cannot be enforced in a Section 1983 action.

In determining whether a particular statute which provides the basis for a Section 1983 claim can be enforced in a Section 1983 action, the Court is obligated to look to the congressional intent in passing the statute. The question to be asked is whether the remedial scheme providing for a violation of the statute at issue is so comprehensive as to evidence a congressional intent not to include a Section 1983 action to enforce the statute. *Middlesex County*, 453 U.S. at 20. Under the current law in this Circuit, a Section 1983 plaintiff enjoys the benefit of a presumption that a federal statute creating enforceable rights may be enforced in a Section 1983 action. *Boatowners and Tenants Ass'n v. Port of Seattle*, 716 F.2d 669 (9th Cir. 1983). However, this presumption may be rebutted by evidence that an exclusive means of enforcement, other than a Section 1983 action, is made a part of the particular statutory scheme. *Id.*

It is clear beyond dispute that Congress did not, and could not, intend to permit enforcement of the guarantees of the NLRA in an action for damages pursuant to Section 1983. Section 10 of the NLRA, 29 U.S.C. § 160, sets forth detailed and comprehensive enforcement proceedings applicable to all charges of unfair labor practices. Moreover, the Ninth Circuit has consistently held that exclusive jurisdiction over all collective bargaining matters rests with the National Labor Relations Board, and that

the Federal District Court lacks jurisdiction to address the merits of unfair labor practice claims or to consider or redress violations of Section 8 of the NLRA. *See Waggoner v. Dallaire*, 767 F.2d 589, 592 (9th Cir. 1985); *Arizona Laborers, Teamsters & Cement Masons Local 395 Health & Welfare Trust Fund v. Conquer Cartage Co.*, 753 F.2d 1512, 1515-17 (9th Cir. 1985).

The comprehensive enforcement scheme created by Congress in enacting the NLRA evidences a clear Congressional intent to preclude enforcement of collective bargaining rights in a damage action under Section 1983. Accordingly, the Court finds that the *Boatowners* presumption is rebutted with respect to Section 8(d) of the NLRA and, therefore, concludes that Golden State's Section 1983 claim must fail under the Second prong of the *Thiboutot-Pennhurst-Middlesex County* test.

In view of the foregoing discussion, the Court is of the view that Golden State's allegations that the City somehow "violated" Section 8(d) of the NLRA do not give rise to a cause of action for damages cognizable under Section 1983. Accordingly, the Court will not award Golden State compensatory damages in this case.

2. *MONETARY RELIEF IN SUPPORT OF INJUNCTION*

Golden State asks this Court to award it monetary relief in conjunction with the Court's award of the injunctive relief discussed previously. According to Golden State, absent some award of monetary relief, the injunction issued by the Court will be meaningless since as a result of the City's preempted conduct it no longer possesses the financial resources to operate a taxicab franchise. Golden State asks the Court to award it ancillary monetary relief in an amount sufficient to enable it to purchase a fleet of taxis, reestablish its maintenance facilities, and hire a new workforce.

The City does not dispute that the Court has broad and flexible monetary remedial powers. However, the City relying on *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) and *Mitchell v. Robert de Mario Jewelry, Inc.*, 361 U.S. 288 (1959), argues that ancillary monetary relief is not available to Golden State in this case since such relief is only appropriate where necessary to disgorge illegal gains from a defendant or to reimburse a plaintiff for sums wrongfully paid to a defendant. Alternatively, the City argues that even if ancillary monetary relief is appropriate in this case, the proper measure of such relief is the net value of Golden State's assets on March 31, 1981, *i.e.*, the fair market value of such assets on that date minus amounts received for the sale of such assets and the amount of any lien of other encumbrance on the assets.[8] This would be the obvious salvage value. The City contends that any other measurement of monetary relief would be highly speculative and would constitute a windfall to Golden State.

The positions of Golden State and the City are both meritorious. It is clear that the Court does in fact have broad equitable powers to fashion a remedy appropriate under the facts of this case. *See Hecht v. Bowles*, 321 U.S. 321 (1944); *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) (court may go beyond matters immediately underlying its equitable jurisdiction and decide whatever additional relief may be necessary under the circumstances); *Handler v. Securities and Exchange Commission*, 610 F.2d 656, 659 (9th Cir. 1979) (district court is inherently vested with broad equitable powers and has the authority to mold its decree to the necessities of a particular case). Because of Golden State's drastically changed circumstances, resulting in large part from the City's nonrenewal of its franchise, any injunction granting Golden State a new franchise without some corre-

[8] On March 31, 1981, Golden State went into Chapter 7 bankruptcy liquidation proceedings.

sponding monetary relief, would be a hollow remedy indeed. This is because Golden State presently lacks the financial resources to recommence its taxicab operation. In light of this, the Court is of the opinion that an award of ancillary monetary relief to Golden State is both necessary and appropriate to give meaning and effect to the injunctive relief award in this case.[9]

The Court agrees with the City that to make an award of monetary relief to Golden State in an amount equal to Golden State's lost profits, or other amounts necessary to purchase a *new* fleet of taxicabs, would be highly speculative and would constitute a windfall to Golden State. This is especially true in light of the fact that Golden State became later involved in Chapter 11 bankruptcy proceedings in March, 1981. Because the purpose of monetary relief ancillary to an injunction is not to compensate a plaintiff for its losses but rather to restore the status quo at the time the defendant's wrongful conduct occurred, the Court finds that the appropriate measure is the salvage value of Golden State's franchise on March 23, 1981, the date the harmful action of the City occurred. This amount of monetary relief will be determined after trial by the Court, sitting without a jury, in calculating the fair market value of Golden State's assets on March 23, 1981, and then subtracting any amounts received by

[9] The Court is not persuaded by the City's attempt to limit the situations in which ancillary monetary relief is appropriate. While the *Porter* and *Mitchell* cases do in fact present two fact situations where equitable monetary relief was awarded, an award of such relief is not limited by those cases but is also appropriate in a wide range of other factual settings. *See, e.g., United States v. Price*, 688 F.2d 204 (3d Cir. 1982) (defendant enjoined from dumping hazardous wastes and required to pay for diagnostic study at dump site); *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C. 1977) (University ordered to provide interpreter to deaf student and to pay the costs of such interpreter).

Golden State in the Chapter 7 bankruptcy liquidation of those assets on March 31, 1981.[10]

One final issue remains for resolution by the Court. Subsequent to the expiration of its franchise on March 31, 1981, Golden State went into Chapter 7 bankruptcy liquidation proceedings. During the course of these proceedings, Eugene Maday, the former sole owner of Golden State, purchased Golden State's interest in this litigation of the bankruptcy sale. The Court expresses no opinion as to the fairness of this sale to Mr. Maday. However, the Court will condition the payment of any ancillary monetary relief by way of salvage value in this case on the recommencement of a viable taxi business by Maday or a transferee from Maday.

Of course, if Mr. Maday wishes to recommence a taxicab business and then sell the on-going franchise with the salvage value of the assets, he is free to do so. If Mr. Maday has no intention of resuming operations, he is still free to sell the franchise and the salvage value of the assets to any one of good moral character.

III. CONCLUSION AND ORDER

For the reasons set forth in this Decision, and good cause appearing, it is hereby ordered that an injunction be entered as follows:

1. That Defendant City of Los Angeles shall grant and award to Plaintiff Golden State Transit Corporation a franchise to operate a fleet of 400 taxicabs within the City of Los Angeles for a four-year term.

2. That Plaintiff Golden State Transit Corporation shall be given a reasonable time, not less than six months

[10] Golden State has no constitutional right to a jury trial with respect to the ancillary monetary relief to be awarded by the Court, since such relief is an equitable rather than legal remedy. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). *See also* 9 Wright & Miller, *Federal Practice & Procedure* § 2302.

nor more than one year from the date of entry of a final judgment in this matter, in which to commence its taxicab operation before the four-year franchise term begins to run.

3. That Defendant City of Los Angeles shall not revoke, suspend, interfere with, or fail to renew the franchise awarded to Plaintiff Golden State Transit Corporation pursuant to this Decision and Order for any reason relating to Golden State Transit Corporation's collective bargaining relationship with its employees on the basis of any condition or circumstances relating to the preempted conduct of the City of Los Angeles.

4. That Plaintiff Golden State Transit Corporation shall not recover compensatory damages from the City of Los Angeles pursuant to 42 U.S.C. Section 1983.

5. That Plaintiff Golden State Transit Corporation shall be awarded monetary relief ancillary to and in furtherance of the above injunction issued by the Court, in an amount equal to the ssalvage value of Golden State Transit Corporation's taxicab franchise on March 23, 1981. The exact amount of said salvage value shall be determined upon trial by the Court, sitting without a jury, said trial to be scheduled at such time as the appellate remedies available to the parties in this matter have been exhausted.

Let Interim Judgment be rendered and entered in accordance with the foregoing and in conformity with the findings and conclusions set forth in this Decision and Order.

CERTIFICATION FOR IMMEDIATE INTERLOCUTORY APPEAL OF ORDER AND INTERIM JUDGMENT

This Order and the Interim Judgment are certified for immediate interlocutory appeal pursuant to 28 U.S.C. Section 1292(b). The Court finds and is of the opinion

that the Order and the Interim Judgment involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal therefrom will materially advance the ultimate termination of the litigation. All further proceedings on this matter in this Court are hereby stayed pending final disposition of such appeal.

DATED: APRIL 23, 1987

/s/ A. Andrew Hauk
A. ANDREW HAUK
United States District Judge

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
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No. 88-840 (6)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

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Petitioner,

v.

CITY OF LOS ANGELES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether in the absence of a direct violation of a federal statute, an allegation that municipal conduct is preempted by a federal statute is cognizable under 42 U.S.C. § 1983?

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, dated September 15, 1988, is reported at 857 F.2d 631 (9th Cir. 1988) and is reprinted in the Appendix to the Petition for Writ of Certiorari ("Pet. App."), at 18a. The opinion of the District Court is reported at 660 F. Supp. 571 (C.D. Cal. 1987) and is reprinted in the Joint Appendix, at 202. Other relevant opinions below are reported, and are cited in the Court's prior ruling in this case, 475 U.S. 608 (1986), reprinted in Pet. App., at 1a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on September 15, 1988. The Petition for Writ of Certiorari was filed on November 16, 1988. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved, set forth in Pet. App. at 32a, are:

Supremacy Clause, United States Constitution, article VI, clause 2;

National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. §§ 151 *et seq.*;

The Civil Rights Act of 1871, 42 U.S.C. § 1983.

STATEMENT OF THE CASE[1]

Background and Facts

This case arose because the City of Los Angeles ("the City") stripped Golden State Transit Corporation ("Golden State") of its franchise and its right to operate its taxicab fleet because Golden State refused to settle a labor dispute with the Teamsters local that represented Golden State's drivers. Prior to the events giving rise to this litigation, Golden State operated a fleet of approximately 400 taxicabs, under the name "Yellow Cab of Los Angeles," pursuant to a franchise issued by the City. Golden State was the largest and the oldest of thirteen companies holding taxicab franchises issued by the City. Golden State's drivers were represented by Local 572 of the International Brotherhood of Teamsters ("Teamsters").

The franchises of all thirteen taxicab companies were due to expire on October 29, 1980. (J.A. 53). On March

[1] This case concerns the remedial aspects of the controversy considered and resolved in Golden State's favor by this Court in *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986). The salient facts and procedural history of this case are set forth in detail in that opinion, 475 U.S., at 609-13, reprinted in the Appendix to the Petition for Writ of Certiorari ("Pet. App."), at 2a-6a. The statement contained in this brief highlights those issues most relevant to the remedial question before the Court.

31, 1980, Golden State applied for a renewal of its franchise. (J.A. 21-22). The other twelve franchise holders also applied for renewals on or about that date. (J.A. 53). The existing franchises were extended several times, in order to allow the City's Department of Transportation, Board of Transportation Commissioners and the Transportation and Traffic Committee of the City Council to consider the renewal requests. (J.A. 23-24, 28-31). Those three bodies each concluded, *inter alia*, that Golden State was in full compliance with the terms and conditions of its franchise, and each recommended that Golden State be granted a franchise renewal until March 31, 1985. (J.A. 25-27, 32, 36, 38-42). An ordinance approving Golden State's long-term franchise renewal, along with ordinances approving franchise renewals for the other taxicab companies, was placed on the City Council calendar for February 11, 1981. (J.A. 38-46).

In October, 1980, Golden State's collective bargaining agreement with the Teamsters expired. (J.A. 52). A short extension of that contract averted an immediate strike, but despite lengthy negotiations (including the assistance of a federal mediator and informal mediation efforts by the Mayor of Los Angeles and members of the City Council), the Teamsters and Golden State remained unable to reach agreement. (J.A. 64). The contract extension was scheduled to expire on February 11, 1981. (J.A. 59).

On February 5, 1981, the Teamsters notified the Mayor of Los Angeles and the President of the City Council of the status of the labor negotiations. (J.A. 58-60). The Teamsters' letters stated that the union would strike on February 11, 1981 if no agreement had been reached, and reminded Council members and the Mayor that the City Council was scheduled to vote on Golden State's franchise renewal at its February 11 meeting. *Id.*

The Teamsters and Golden State did not reach a settlement, and Golden State's drivers went on strike on February 11, 1981. (J.A. 54). At the February 11,

1981, City Council meeting, Teamsters representatives reviewed the details of bargaining for the Council, and urged that Golden State's franchise not be renewed. *Id.* The City complied, ignoring Golden State's plea that the City refrain from becoming involved in the labor dispute. The City also approved all other pending taxicab franchise renewal applications. 475 U.S., at 610, Pet. App., at 3a. On February 17, 1981, again at the urging of Teamsters representatives and over the protests of Golden State, the City Council denied Golden State a long-term franchise renewal.

On March 23, 1981, the City Council rejected a motion by the Chair of the Council's Transportation and Traffic Committee to extend Golden State's franchise until April 30, 1981.[2] (J.A. 44). As the Court noted, "[b]y this time, the labor dispute and the franchise renewal issue had become clearly intertwined." 475 U.S., at 610, Pet App., at 3a. At the March 23 Council meeting, Teamsters and AFL-CIO representatives accused Golden State of bargaining in bad faith, claimed that Golden State's refusal to accede to the Teamsters' "extraordinarily modest" demands was the cause of the strike, and again urged that Golden State's franchise not be renewed. (J.A. 63-65, 66-67). In urging rejection, the Teamsters expressed the view that after the City refused to renew Golden State's franchise, the Teamsters would be able to achieve a "decent living with decent benefits . . . with whoever is the franchise that follows . . . ." The union urged an immediate "no" vote on the renewal "so that steps can be taken as early as possible to open up the area to either a new franchise or an existing franchise." (J.A. 65). Golden State again urged neutrality. (J.A. 62-63).

[2] Throughout the labor negotiations that continued during this period, Teamsters representatives threatened that "if [Golden State] doesn't settle [its] labor dispute, [it is] going to have a lot of trouble renewing [its] franchise" and specifically threatened that "we are going to see that the City revokes or does not renew your franchise if you do not meet our demands." (J.A. 55).

The strike was central to the Council's discussion at the March 23 meeting, and the Council plainly allied itself with the union. 475 U.S., at 611, Pet. App., at 4a. Members of the City Council voting against franchise renewal stated that they would be willing to renew the franchise if Golden State signed a new collective bargaining agreement with the Teamsters in the next several days.[3] Several members stated that they voted against renewal because they disapproved of Golden State's negotiating posture and its refusal to accede to the Teamsters' demands. (J.A. 74-75). One member charged Golden State with negotiating unreasonably (J.A. 74); another accused the company of trying to "break[] the back of the union." (J.A. 69); *see* 475 U.S., at 611, Pet. App., at 4a.

The City Council voted not to extend the franchise. The trial court found that it was "undisputed that the sole basis for refusing to extend plaintiff's franchise was its labor dispute with its Teamster drivers," 520 F. Supp. 191, 193 (C.D. Cal. 1981); *id.*, at 193-94, and that the City Council "insisted upon resolution of the dispute as a condition to franchise renewal," a finding that has been repeatedly affirmed on appeal. 754 F.2d 830, 833 (9th Cir. 1985).

Golden State immediately initiated this lawsuit against the City, seeking declaratory and injunctive relief and

[3] Councilman Cunningham stated, "I think it would be wise for us as members of this Council to clearly make a statement by turning down this extension as soon as there is an agreement, we can certainly reopen the matter and be able to extend the franchise . . . . I'm going to vote no on the extension and I can assure you that as soon as this dispute is resolved I will be the first one to bring in the findings . . . ." (J.A. 70, 72). And Council President Ferraro stated "It will be very difficult to get this ordinance past [sic] to extend this franchise if the labor dispute is not settled by the end of this week. And I think that both sides should realize that, that it appears that the Council is not going to extend this franchise today, and both sides should realize that . . . if it is not done by the end of this week, that there is a very good possibility that there will not be a franchise for Yellow Cab. . . ." (J.A. 7[illegible]).

damages. On April 13, 1981, the U.S. District Court for the Central District of California found that the City's conduct denied Golden State rights granted by the federal labor laws and enjoined the City's interference in the labor dispute. 520 F. Supp. 191 (C.D. Cal. 1981); *see* 475 U.S., at 611-12, Pet. App., at 4a-5a. This preliminary injunction was overturned on appeal, 686 F.2d 758 (9th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). The Ninth Circuit held that even though the City refused to renew Golden State's franchise because of the labor dispute, 686 F.2d, at 759, regulation of streets and highways was a matter of "local concern" that could not conflict with federal labor law. *Id.*, at 760.

The case was remanded to the district court, which denied Golden State's renewed request for injunctive relief. On April 29, 1983 (the day following that denial), the City, still in the midst of this litigation, served a cease and desist order upon Golden State, forcing its cabs off the roads and ultimately destroying its business.[4]

The case returned to the Ninth Circuit, where a new panel disavowed the circuit's prior opinion, holding that reliance upon the "local concern" exemption had been misplaced because municipal regulation of labor matters involving "streets and highways" could conflict with federal labor law. 754 F.2d 830, 832-33 (9th Cir. 1985). The Ninth Circuit concluded, however, that "only actions seeking to directly alter the substantive outcome of a labor dispute should be preempted," *id.*, at 833, and that the City had not attempted to dictate the substantive terms of the parties' collective bargaining agreement. *Id.*

---

[4] At the time of this cease and desist order, Golden State was involved in an involuntary Chapter 11 reorganization initiated by one of its creditors. The Chapter 11 proceeding subsequently was converted to a Chapter 7 liquidation. The right to pursue this litigation, in the corporation's name, was purchased by the owner of Golden State from the bankruptcy estate in a sale supervised by the bankruptcy court.

This Court's Previous Ruling

This Court granted certiorari and reversed. The Court found ample evidence in the record to support the trial court's finding that the City had conditioned renewal of Golden State's franchise upon resolution of the labor dispute, 475 U.S., at 615-16 n.6, Pet. App., at 9a n.6, and held that the City Council's attempt to force a settlement of the labor dispute denied Golden State its right to rely upon its economic strength in a labor dispute and to bargain free from government coercion.

> The parties' resort to economic pressure was a legitimate part of their collective-bargaining process. *Machinists* [*v. Wisconsin Employment Relations Comm'n*], 427 U.S. [132], at 144. But the bargaining process was thwarted when the city in effect imposed a positive durational limit on the exercise of economic self-help. . . .

475 U.S., at 615, Pet. App., at 8a-9a.

> " '[r]esort to economic weapons should more peaceful measures not avail' is the right of the employer as well as the employee," and "the State may not prohibit the use of such weapons. . . any more than in the case of employees." *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S., at 147, quoting *American Ship Building Co. v. NLRB*, 380 U.S., at 317. "[F]ederal law intended to leave the employer and the union free to use their economic weapons against one another." *Belknap, Inc. v. Hale*, 463 U.S., at 500. We hold, therefore, that the city was preempted from conditioning Golden State's franchise renewal on the settlement of the labor dispute.

475 U.S., at 618, Pet. App., at 12a. The Court reaffirmed that freedom of contract and unfettered collective bargaining—free from coercion by *any* governmental entity—were fundamental to the federal labor laws, stating:

> *A local government, as well as the National Labor Relations Board*, lacks the authority to " 'introduce some standard of properly "balanced" bargaining

> power' . . . or to define 'what economic sanctions might be permitted negotiating parties in an "ideal" or "balanced" state of collective bargaining.'" *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S., at 149-150, quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 497-500 (1960).

475 U.S., at 619, Pet. App., at 12a-13a (emphasis added).[5] On this basis, the Court held that municipal coercion such as applied here directly conflicted with free collective bargaining and the system of private industrial dispute settlement created by Congress. Justice Rehnquist dissented, reasoning that the NLRA did not support this application of the Court's labor law preemption doctrine. 475 U.S., at 623, Pet. App., at 16a-17a.

Post-Remand Proceedings

On remand the district court granted Golden State summary judgment on liability, finding once again that the City had refused to renew Golden State's franchise because of the labor dispute.[6] During the course of argument on summary judgment, however, Judge Hauk *sua sponte* ordered further argument and briefing on the court's power to award compensatory damages to Golden State. After briefing and argument, the district court held that it had no power to award damages under Section 1983 both because "the NLRA does not create rights and obligations with respect to third parties who are not

[5] The *Machinists* opinion upon which this Court relied stated further "neither States nor the Board is 'afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful.'" 427 U.S., at 149 (quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 498 (1960)).

[6] Golden State had not filed a motion for summary judgment prior to initial Supreme Court review. In the post-remand summary judgment proceedings in the district court, the City did not present any evidence, contenting itself with arguing that every court that had considered this case—including this Court—had misconstrued the record and the City's motives. *See* Def. Opp. Mem. (J.A. 170). Summary judgment was entered without written opinion. *See* Order of Sept. 19, 1986 (J.A. 183).

parties to a collective agreement," 660 F. Supp. 571, 579 (C.D. Cal. 1987) (J.A. 216), and because the primary jurisdiction of the National Labor Relations Board ("NLRB") over wrongs committed by employers and unions precluded Section 1983 relief against state or local governments, *id.* Judge Hauk concluded, based upon the concession of the City, *see* Def. Mem. of Pts. & Auth. at 1 (J.A. 170), that he had the power to award injunctive relief, and also awarded ancillary monetary relief limited to the fair market value of Golden State's "tangible assets" on March 23, 1981 (the date the City Council stripped Golden State of its franchise), less any sums received by Golden State during the ensuing bankruptcy proceeding. *Id.*, at 581 (J.A. 222).[7] The court, at the joint request of the parties, agreed to certify for immediate appeal the issue of its power to award compensatory damages. *Id.*, at 582 (J.A. 222-23).

The Decision Below

The Ninth Circuit affirmed. The panel majority found that Section 1983 was limited to cases involving a "direct violation" of a federal statute. The court then held that the express language of the NLRA "impose[s] obligations [only] on 'an employer' and on 'a labor organization.' Actions of a third-party, not employer or employee labor organization, do not give rise" to a "direct violation" of the NLRA, 857 F.2d 631, at 635, Pet. App., at 24a, thereby concluding that the City's decision to strip Golden State of its franchise, although plainly unlawful pur-

[7] Ancillary monetary relief purportedly was designed to take into account Golden State's "changed circumstances" and thereby ensure that injunctive relief was not a "hollow remedy." (J.A. 218-19). Although the propriety of the remedy granted by the district court is not before the Court, it bears noting that by refusing to allow any compensation for the goodwill and going concern value of the largest and oldest cab company in Los Angeles, and by matching the value of Golden State's limited tangible assets against all of its intangible liabilities, the ancillary monetary relief ordered by the district court is highly unlikely to offer any recompense for Golden State's injuries.

suant to this Court's prior opinion, was not remediable under Section 1983. Despite the clear absence of any alternative federal statutory remedy against the City, the panel further held that Congress deliberately precluded judicial enforcement of Golden State's rights under Section 1983 by empowering the NLRB to rectify unfair labor practices committed by employers and unions, 857 F.2d, at 635, Pet. App., at 25a. While the panel conceded that Section 1983 relief might be available in a Supremacy Clause case where the challenged action created a "direct and actual conflict with federal law," 857 F.2d, at 635, Pet. App., at 26a, it held that there was no direct or actual conflict between the City's action and the NLRA because "the NLRA does not *explicitly* prohibit the City from acting in the area of labor relations," 857 F.2d, at 636, Pet. App., at 27a (emphasis added).

Judge Alarcon concurred in the judgment "under compulsion of our decision in *White Mountain Apache Tribe v. Williams (White Mountain)*, 810 F.2d 844 (9th Cir.), *cert. denied*, [479 U.S. 1060] 107 S. Ct. 940 (1987)." 857 F.2d, at 637, Pet. App., at 29a. Admitting that "the law of the circuit compels us to hold that section 1983 damages are not available because the City of Los Angeles did not directly violate the National Labor Relations Act," Judge Alarcon concluded that "I believe that *White Mountain* is inconsistent with the reasoning of the Supreme Court in *Wright v. Roanoke Redev. and Housing* [479 U.S. 418] 107 S. Ct. 766 (1987)," 857 F.2d, at 637, Pet. App., at 29a.

> The Court in *Wright* did not hold that a state actor would be liable only if a federal statute expressly forbids the state actor from such interference. Instead, the Court focused on protecting the right secured by federal law, and not on whether all persons who might deprive another of the benefits of such a statute are identified by Congress. The language used by the Court in *Wright* carries out the plain meaning of the language of section 1983. Our opinion in *White Mountain* frustrates congressional intent.

857 F.2d, at 637, Pet. App., at 30a.

On February 21, 1989, this Court granted certiorari and requested that the parties address the following question: "Whether in the absence of a direct violation of a federal statute, an allegation that a state statute is preempted by a federal statute is cognizable under 42 U.S.C. 1983." [8]

SUMMARY OF ARGUMENT

Golden State's business was destroyed by the City, in contravention of both "the language of the NLRA and its legislative history", 475 U.S., at 616, Pet. App., at 9a, because Golden State insisted upon the exercise of rights created by Congress. Section 1983 relief, including an award of compensatory damages, is the normal federal court remedy where an individual is punished by a municipality for exercising federal rights. "[T]he central objective of the Reconstruction-Era civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Burnett v. Grattan*, 468 U.S. 42, 55 (1984).[9] A by-product of the Civil War, Section 1983 (and its sister civil rights statutes) empowered the federal courts to ensure the supremacy of national law, guaranteeing citizens that their federal

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[8] While the Court's question refers to a state statute, this case deals with an action by a local government. We presume the Court's phrasing of this portion of the question was inadvertent, and have amended the Question Presented portion of this brief to conform the issue to the identity of the parties. Because the City of Los Angeles is a municipality, questions of state sovereign immunity are not involved in this case. It has long been established that, unlike states, municipal governments enjoy no Eleventh Amendment immunity from damages, *see Monell v. Department of Social Servs.*, 436 U.S. 658, 690 & n.54 (1978), and cannot claim good-faith immunity under Section 1983, *Owen v. City of Independence, Mo.*, 445 U.S. 622, 639 (1980).

[9] *See also Felder v. Casey*, —— U.S. ——, 108 S. Ct. 2302, 2307 (1988).

rights, privileges and immunities are practical realities that will be respected by state and local governments, rather than meaningless abstractions.[10]

The means chosen by Congress to guarantee local government respect for federal law was creation of a damage remedy against state and local governments and officials who deny individuals rights granted under federal statutory and constitutional law. "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation . . . . The very purpose of [Section] 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights. . . ." *Mitchum v. Foster*, 407 U.S. 225, 239, 242 (1972).[11] Remedies available under Section 1983 thus serve the dual purposes of compensation and deterrence. As this Court repeatedly has observed, Section 1983 "was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." *Owen v. City of Independence, Mo.*, 445 U.S. 622, 651 (1980) (citing *Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978); *Carey v. Piphus*, 435 U.S. 247,

[10] As the Court observed in *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972), Section 1983 was part of a "basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment," resulting in a "new structure of law" within which "the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established." *See generally* Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?* 60 N.Y.U. L. Rev. 1, 4-7 (1985); Note, *Section 1983 Remedies for the Violation of Supremacy Clause Rights*, 97 Yale L.J. 1827, 1831-35 (1988).

[11] *See also Wilson v. Garcia*, 471 U.S. 261 (1985); *Owen v. City of Independence, Mo.*, 445 U.S. 622, 651 (1980) ("A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees. . . .").

256-57 (1978)); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981).

The broad proposition relied upon by the City— that cases involving the Supremacy Clause should be excluded from the normally available remedies provided under Section 1983—must be rejected in light of these legislative purposes. The language and legislative history of Section 1983, and the manner in which the statute has been construed by this Court, establish that preemption cases as such were not intended to fall outside the scope of Section 1983. Section 1983 was enacted to provide the federal courts with authority to meaningfully ensure the primacy of federal law; according federal law priority is the function of the Supremacy Clause itself, and preemption cases thus cannot realistically be excluded from Section 1983.

Moreover, the circumstances of this case demonstrate that denying Section 1983 relief in all Supremacy Clause cases would contravene the will of Congress as expressed in both Section 1983 and underlying statutes—such as the National Labor Relations Act—whose commands are made binding upon state and local governments only through article VI, clause 2 of the Constitution. Where Congress has specifically determined that private parties are free to act in a particular fashion without fear of government sanction, as it has here, Section 1983 relief must be available to prevent local governments from setting aside binding congressional decisions to the detriment of citizens who have relied thereon.

ARGUMENT

I. THE LANGUAGE, LEGISLATIVE HISTORY, AND JUDICIAL INTERPRETATION OF SECTION 1983 REQUIRES ITS APPLICATION TO PREEMPTION CASES.

The Supremacy Clause, the very mechanism by which the federal Constitution and laws are made binding on the states, is a vital portion of the Constitution, "[securing] federal rights by according them priority whenever

they come in conflict with state law." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979).[12] Section 1983, prohibiting the deprivation of federal rights under color of state law, provides the federal courts with remedial authority necessary to translate this principle of federal supremacy into concrete and meaningful form.

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[12] As stated above, the Court in *Chapman* held that the Supremacy Clause "secured" rights within the meaning of 28 U.S.C. Section 1343(4). 441 U.S., at 613. *Chapman* further held that the Supremacy Clause, standing alone, did not create substantive rights that could support a cause of action cognizable under 28 U.S.C. § 1343(3), a statute granting the federal courts jurisdiction to redress deprivations under federal laws "providing for equal rights," or under 28 U.S.C. § 1343(4), which provides jurisdiction for suits alleging deprivations under laws "providing for the protection of civil rights, including the right to vote." The Court's holding thus addressed only the scope of 28 U.S.C. § 1343, a specifically limited jurisdictional statute of little significance today, given congressional removal of the amount in controversy provision from 28 U.S.C. § 1331. *See generally* Note, *Section 1983 Remedies for the Violation of Supremacy Clause Rights*, 97 Yale L.J. 1827, 1840-41 (1988).

Most significantly, in *Chapman* there was no unanimity about the scope of Section 1983, a statute that covers deprivations of federal rights "secured by the constitution *and laws*" rather than any particular subset of federal laws. Thus, while the Court held that the Supremacy Clause created no substantive rights for purposes of Section 1343, and that the Social Security Act, the underlying statute in *Chapman*, was not a law "providing for equal rights" or "providing for the protection of civil rights," the Court did not determine whether this narrow construction also applied to the more broadly phrased Section 1983. This issue was resolved the following term in *Maine v. Thiboutot*, 448 U.S. 1 (1980), when the Court held that Section 1983 provided broad protection for all federal statutory rights and was not limited to "civil rights" or "equal rights" statutes. 448 U.S., at 8 nn. 5 & 6. In so defining the scope of Section 1983, the *Thiboutot* Court observed that "[t]here is no inherent illogic in construing § 1983 more broadly than § 1343(3) was construed in [*Chapman*]. It would only mean that there are statutory rights which Congress has decided cannot be enforced in the federal courts unless 28 U.S.C. § 1331(a)'s $10,000 jurisdictional amount is satisfied." *Id.* at 8 n.6.

Nothing in the language or legislative history of Section 1983 supports the proposition that cases involving the Supremacy Clause were to be excluded from the scope of the statute. Section 1983 provides a remedy for deprivation, under color of state law, of "*any rights, privileges and immunities* secured by the Constitution and laws" of the United States. The statute does not exclude some provisions of the Constitution or laws from its scope; it neither states nor implies that preemption claims are in some fashion less important than other statutory or constitutional claims, and there is no principled basis upon which to conclude that the Supremacy Clause, alone among the provisions of the Constitution, is less important or less enforceable than other provisions. Section 1983's broad and inclusive statutory language, providing a remedy for the deprivation of *any* federal statutory and constitutional rights, privileges and immunities, should continue to be given "a sweep as broad as its language", and this Court should steadfastly refuse "to seek ingenious analytical instruments for excluding from its general language" particular constitutional provisions. *United States v. Price*, 383 U.S. 787, 801 (1966).[13]

The legislative history of Section 1983, replete with debate regarding the propriety of imposing the federal

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[13] *See also Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986) (refusing to draw distinction between substantive and procedural rights); *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972) (refusing to draw distinction between personal liberties and property rights); *and see Owen v. City of Independence, Mo.*, 445 U.S. 622, 635-36 (1980) (legislative history of Section 1983 confirms "the expansive sweep of the statutory language" and the Act's "broad remedy for violations of federally protected rights"); *Monell v. Department of Social Servs.*, 436 U.S. 658, 684 (quoting Representative Shellabarger), 685 n.45 (quoting Representative Bingham) (1977); Note, *Section 1983 Remedies for the Violation of Supremacy Clause Rights*, 97 Yale L.J. 1827, 1835 (1988) (noting that the Court "has never placed a constitutional provision outside section 1983.").

will upon state and local governments and their agents, understandably contains no suggestion that all federal court actions involving the Supremacy Clause would fall outside the scope of Section 1983. It would be ironic indeed if the Congress intent upon ensuring the primacy of federal laws were to single out as unworthy of enforcement the one constitutional provision itself binding the states to the federal will. In the absence of express language or legislative history indicating a deliberate congressional refusal to allow Section 1983 remedies in preemption cases, the plain language of the statute as well as the congruent purposes of Section 1983 and the Supremacy Clause require comprehensive relief where—as here—an action is brought precisely to ensure that the deliberate decisions of Congress are afforded the priority they deserve.[14]

A contrary construction—that Supremacy Clause cases as such can never fall under Section 1983—raises serious concerns for another vital reason. The Supremacy Clause is explicitly or implicitly involved in every case in which state or local government deprivation of federal rights is alleged, simply because the Supremacy Clause is the

[14] During the congressional debates on the Reconstruction-Era civil rights acts, one representative did comment on the difference between constitutional provisions relating "to the divisions of the political powers of the State and the General Governments" and provisions securing "the rights or the liabilities of persons within the States, *as between such persons and the States*." Cong. Globe, 42d Cong., 1st Sess., App. 69 (1871) (Rep. Shellabarger) (emphasis added). As discussed *infra*, the Supremacy Clause in this case operates precisely to secure the rights of Golden State against the state. Moreover, as the Court explained in *Monell v. Department of Social Servs.*, 436 U.S. 658, 670-72 (1978), these remarks were made in debate over the Sherman Amendment, a provision that was not enacted into law, which would have provided a cause of action against municipalities on behalf of persons injured in the course of race riots occurring in the municipality. It is impossible to construe the comments of a single congressman, aimed at explaining an entirely different statutory provision, as a concrete indication that the entire Congress deliberately decided to exclude all preemption cases from the scope of Section 1983.

deus ex machina by which the federal Constitution and statutes are made binding upon state and local governments. Every Section 1983 case involves some form of preemption under the Supremacy Clause, because each and every such case involves an alleged conflict between state or local action and federal law. Thus even a First Amendment claim raised under Section 1983 involves the Supremacy Clause, because it is only article VI, clause 2 of the Constitution that makes the First Amendment "supreme" over contrary state or local laws.

A conclusion that Section 1983 relief is never available in any case involving the Supremacy Clause thus would eviscerate Section 1983. Moreover, since this Court's decision in *Maine v. Thiboutot*, 448 U.S. 1 (1980), it has been well established that Section 1983 relief is available for federal statutory (as well as constitutional) claims. The proposition that Section 1983 relief is never available in cases involving the Supremacy Clause would overrule *Thiboutot*, because the only constitutional provision binding the states to obey federal statutes is the Supremacy Clause itself.

We do not propose that Section 1983 relief is necessarily appropriate in every preemption case. Succeeding portions of this brief discuss criteria for determining whether Section 1983 relief might be inappropriate, even though the claim involves the Supremacy Clause in some way. The possibility of such principled limitations, however, should not obscure the critical point made above; that a Supremacy Clause claim is not *ipso facto* outside the scope of Section 1983.

II. SECTION 1983 RELIEF MUST BE AVAILABLE WHERE MUNICIPAL GOVERNMENT ACTION DENIES PARTIES THE RIGHT TO ENGAGE IN CONDUCT PROTECTED BY FEDERAL LAW.

Should the Court wish to formulate a standard delineating precisely when Section 1983 relief should be available in preemption cases—a question that we do not believe is necessary to decide the dispute between Golden

State and the City—we suggest the following rule: Section 1983 relief should be available in preemption cases where an underlying federal statute protects or prohibits private conduct, and local government action contravenes the federal protection or prohibition causing concrete harm to individuals whose rights have been addressed by Congress. In such cases, the Supremacy Clause protects private parties from injuries inconsistent with the will of Congress, and preserves the federal statutory scheme from local government interdiction. Section 1983 and the Supremacy Clause operate together in such cases to safeguard rights, privileges and immunities created by Congress and secured by the Constitution.

A. The Right to Bargain Free From Government Coercion Must be Enforced Through Section 1983.

Section 1983 is designed to protect "rights, privileges and immunities" secured by the federal Constitution and laws. Since *Maine v. Thiboutot*, 448 U.S. 1 (1980), consistent with Section 1983's broad mandate to protect fully all federal statutory and constitutional rights, this Court has held Section 1983 applicable to statutory claims except in two limited circumstances: first, where the statutory provisions involved "were thought to be only statements of 'findings' indicating no more than a congressional preference—at most a 'nudge in the preferred directio[n],' and not intended to rise to the level of an enforceable right," *Wright v. City of Roanoke Redev. and Hous. Auth.*, 479 U.S. 418, 423 (1987) (citation omitted); *see also id.*, at 433 (O'Connor, J., dissenting), and second, where the municipal defendant "demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose [§ 1983 relief]," *id.*, at 423. The Court in *Wright* stated unequivocally that "'[w]e do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally

secured right." *Id.*, at 423-24 (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)).[15]

Neither of these recognized exceptions to Section 1983 relief applies to Golden State's underlying statutory claims. This Court's prior *Golden State* ruling establishes beyond peradventure that Congress imposed a mandatory ban on local government intervention in the collective bargaining process, and has endowed both management and labor with enforceable rights to bargain and to resort to economic weapons free from government coercion. Un-

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[15] *See also* Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. Rev. 1, 27 (1985) ("the Court has been careful to maintain the independence of the remedy provided in § 1983 and the other Civil Rights Acts against implied repeal by other federal statutes, *requiring that congressional intent to do so be clear.*" (emphasis added)). By placing upon the municipal defendant the burden of proving congressional intent to deny relief, Section 1983 operates from an entirely different premise than is applied in implied private right of action cases. In such cases, the burden is placed upon the proponent of the cause of action to establish that Congress implicitly intended to allow private parties to settle their disputes with one another in the federal courts. The four factor analysis initially enunciated in *Cort v. Ash*, 422 U.S. 66 (1975), is the key to this inquiry. While the first of the *Cort* factors—whether the statute was passed for the especial benefit of the plaintiff—may be useful in deciding whether Congress intended to create enforceable rights against state or local governments, *see Wright, supra*, 479 U.S., at 432-33 (O'Connor, J., dissenting), the presumption in Section 1983 litigation is that if Congress has created such a right, Section 1983 is "an independent safeguard against deprivations" by state or local governments, *Smith v. Robinson*, 468 U.S. 992, 1012 (1984), that may be invoked by private parties absent deliberate congressional interdiction. The concerns normally considered by the Court in deciding to allow a direct suit against a federal defendant, pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), also are not applicable here, simply because Congress has authorized a specific statutory remedy for municipal deprivation of any rights, privileges or immunities secured by federal law.

like *Pennhurst* cases,[16] this case does not involve a cooperative federalism scheme in which federal funds are tied to a desirable, but non-mandatory, norm. The Court specifically held in *Golden State* that Congress, in enacting and amending the NLRA, deliberately intended to prohibit government coercion in collective bargaining and government attempts to prevent the parties from utilizing economic weapons against each other.[17]

Neither can there be any doubt that in enacting and amending the National Labor Relations Act, Congress was prescribing the rights and responsibilities of management

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[16] *See Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, at 20 (1981) (legislative history of act in question led to conclusion "that Congress intended to encourage, rather than mandate, the provision of better services to the developmentally disabled."); *Rosado v. Wyman*, 397 U.S. 397, 413 (1970) ("Congress sometimes legislates by innuendo, making declarations of policy and indicating a preference while requiring measures that though falling short of legislating its goals, serve as a nudge in the preferred directions."); *see also Samuels v. District of Columbia*, 770 F.2d 184, 195 (D.C. Cir. 1985) ("[S]ection 1983 . . . will not lie to enforce vague policy sections of federal statutes intended only to advise, rather than to mandate . . . ."); *see also id.*, at 197, and cases cited therein.

[17] " 'Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA.' *New York Tel. Co. v. New York Labor Dept.*, 440 U.S. [519], at 551 [1979] (POWELL, J., dissenting). Even though agreement is sometimes impossible, government may not step in and become a party to the negotiations. *See H. K. Porter Co. v. NLRB*, 397 U.S. [99], at 103-04 [1970]. A local government, as well as the National Labor Relations Board, lacks the authority to ' " introduce some standard of properly 'balanced' bargaining power" . . . or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining." ' *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. [132], at 149-150 [1976], quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 499-500 (1960). The settlement condition imposed by the Los Angeles City Council . . . destroyed the balance of power designed by Congress, and frustrated Congress' decision to leave open the use of economic weapons."

475 U.S., at 619, Pet. App., at 12a-13a.

and labor.[18] Golden State, as an employer, was one of the parties for whose "especial benefit" the preclusion on government interference with collective bargaining was enacted. *See Wright, supra*, 479 U.S., at 432-33 (O'Connor, J., dissenting). Indeed, management and labor must be the "especial beneficiaries" of Congressional protection of the bargaining process, because they are the only parties directly involved in that process. Golden State certainly does not appear here as a member of the general public, incidentally benefited by a statute designed to enhance the general public weal. To the contrary, as the Court repeatedly has recognized, under the NLRA " ' "[r]esort to economic weapons should more peaceful measures not avail" *is the right of the employer as well as the employee*,' and 'the State may not prohibit the use of such weapons . . . any more than in the case of employees'." *Golden State*, 475 U.S., at 618, Pet. App., at 12a, quoting *Machinists v. Wisconsin Employ. Rel. Comm'n*, 427 U.S., at 147 (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, at 317 (1965) (emphasis added)). The flat ban on government coercion in collective bargaining and on interference with economic sanctions, previously recognized by the Court, simply does not fit within an exception designed to encompass congressional suggestions, hints and innuendo.

Moreover, this mandatory command is enforceable only in federal court because Congress created no administrative remedy for governmental interference with the collective bargaining process. Section 10 of the National Labor Relations Act, 29 U.S.C. § 160, empowers the National Labor Relations Board to prevent and remedy unfair labor practices, which are defined in Section 8 of the Act as conduct by employers and unions. Because a mu-

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[18] Section 1(b) of the Taft-Hartley Act, 29 U.S.C. § 141(b) (1982) states (in pertinent part):

> It is the purpose and policy of this chapter . . . to prescribe the legitimate rights of both employees and employers. . . .

nicipality is technically incapable of committing an unfair labor practice under the NLRA, the Act does not delineate remedies for the City's impermissible conduct in the instant case.

For this reason, this case does not fall within the *Middlesex* exception to Section 1983 relief, which applies only where private parties whose rights have been defined by Congress have some avenue of relief available under the statute in question. In *Wright*, *supra*, this Court emphasized that the *Middlesex* exception to Section 1983 relief was applicable only where the statute contained some means whereby a protected private party could obtain redress [19] and found that the remedial scheme of the Housing Act of 1937, 42 U.S.C. § 1401 *et seq.*, did not foreclose Section 1983 relief because the statute failed to grant any private remedy to preserve the right in question.

> In both *Sea Clammers* and *Smith v. Robinson*, *the statutes at issue themselves provided for private judicial remedies*, thereby evidencing congressional intent to supplant the § 1983 remedy. There is nothing of that kind found in the Brooke Amendment or elsewhere in the Housing Act.

479 U.S., at 427 (emphasis added).

The argument against preclusion of Section 1983 in the present case is far more compelling than in *Wright*. Here, the NLRB has absolutely *no* regulatory power over Los

[19] In *Sea Clammers* [*Middlesex County Sewerage Auth. v. National Sea Clammers Association*, 453 U.S. 1 (1981)] an intent to foreclose resort to § 1983 was found in the comprehensive remedial scheme provided by Congress, *a scheme that itself provided for private actions* [*against the defendants in question*] *and left no room for additional private remedies under § 1983*. Similarly, *Smith v. Robinson*, 468 U.S. 992, 1012 (1984), held that allowing a plaintiff to circumvent the Education of the Handicapped Act's administrative remedies would be inconsistent with Congress' carefully tailored scheme, *which itself allowed private parties to seek remedies for violating federal laws*.

479 U.S., at 423 (emphasis added).

Angeles, and no "authority to oversee the operation" of the City through which it might somehow rectify municipal wrongs.[20] In the absence of some private remedy under the statute,[21] or evidence of preclusive intent garnered from statutory language or legislative history, it is impossible to conclude that Congress deliberately intended to preclude the parties whose rights it had protected—in this case, management and labor—from seeking judicial relief against municipalities under Section 1983. *See Wright*, 479 U.S., at 424-28. It would be ironic indeed if the NLRB's jurisdiction, created to encourage the practice and procedure of collective bargaining, were allowed to prevent effective protection of the collective bargaining process that forms the "cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA." *Golden State*, 475 U.S., at 619, Pet. App., at 12a (quoting *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 551 (1979) (Powell, J., dissenting)).[22]

[20] In *Wright*, the Housing Act gave the Department of Housing and Urban Development considerable authority to oversee the operation of the Public Housing Authorities that were defendants in the litigation.

[21] This case in no way implicates the primary jurisdiction of the Labor Board. The Ninth Circuit's erroneous attempt to inject the primary jurisdiction issue into this case necessarily implies that the NLRB might be able to adjudicate the underlying allegations against the City, a proposition that neither the City nor the courts below even suggested. Indeed, the primary jurisdiction doctrine would divest the federal courts of the power to adjudicate this case at all, *cf. International Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986), directly contrary to this Court's prior holding that Golden State had presented a wrong remediable in the federal courts. Such a proposition also flies in the face of the City's admission that injunctive relief against it is proper in this case. Deference for the NLRB's primary jurisdiction logically should bar judicial consideration of this case *in toto*, not merely the imposition of a damage remedy as opposed to injunctive relief.

[22] We would agree that the administrative scheme created by Congress under the National Labor Relations Act, which allows remedies against employers and unions, is comprehensive and thus preclusive for purposes of determining the rights of employers

Rather than relying upon these well-established Section 1983 criteria, which reveal that Golden State has rights enforceable under Section 1983, the Ninth Circuit held that Section 1983 relief is unavailable unless state or local conduct "directly violates" a federal statute. This Court never has recognized any such limitation; neither has any other circuit court. The appropriate test in Section 1983 cases lies not in exclusive emphasis on statutory language, but in determining the intent of the legislature, as this Court repeatedly has observed:

> In determining whether a statute creates enforceable rights, the "key to the inquiry is the intent of the Legislature." *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 13 (1981). We have looked first to the statutory language, to determine whether it is "phrased in terms of the persons benefited" and is cast in mandatory rather than precatory terms. *We then have reviewed the legislative history of the statute and other traditional aids of statutory interpretation to determine congressional intent to create enforceable rights.*

Wright, 479 U.S., at 433 (1987) (O'Connor, J., dissenting) (citations omitted) (emphasis added).

Indeed, a "direct violation" limitation is at odds with the language of Section 1983, which does not speak of statutory "violations," direct or indirect, but of "*deprivation*[*s*] *of any rights*, privileges, or immunities secured by the Constitution and laws." As noted above, at 15, the Court has given Section 1983 a construction as broad as its language, and has eschewed every attempt to create artificial limitations of this very sort on the scope of a remedy that Congress intended to protect the constitutional and statutory rights of all citizens. *See Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972); *United States v. Price*, 383 U.S. 787 (1966); Note, *Section 1983 Remedies for the Violation of Supremacy Clause Rights*, 97 Yale L.J. 1827, 1834-35 (1988).

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and labor organizations *inter se*. *Compare Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282 (1986).

Moreover, a "direct violation" test is ill-defined and indeterminate. Such a test necessarily implies that a statute can be violated both "directly" and "indirectly," a conclusion that has no precedential anchor. This test further rests upon the proposition that the legislative will is somehow less binding if Congress does not express itself precisely enough to pass a judicial test of clarity and specificity. A "direct violation" inquiry, addressed solely to the explicit language of the statute, trivializes the power of the federal courts—and particularly this Court—to interpret statutes, in light of legislative history, to achieve the results intended by Congress. For these reasons, we agree wholeheartedly with Judge Alarcon below, who stated that the "direct violation" test contradicts this Court's Section 1983 decisions, as exemplified by *Wright*, *supra*, which properly concentrate on "protecting the right secured by federal law, and not on whether all persons who might deprive another of the benefits of such statute are identified by Congress." 857 F.2d, at 637, Pet. App., at 30a.

The Ninth Circuit used this unprecedented "direct violation" test in effect to nullify the Court's prior ruling, by holding that the literal language of the NLRA, read in isolation, was not "directly violated" in this case.

> [T]his statute imposes "mutual obligation[s]" upon "the employer and the representative of the employees" to "bargain collectively" and "in good faith."
> . . .
>
> Actions of a third-party, not employer or employee labor organization, do not give rise to a claim for damages against the third party under these provisions.

857 F.2d, at 635, Pet. App., at 24a. The Ninth Circuit stated further that "we cannot say that the City's actions directly conflict with an 'explicit provision' of the NLRA—*the NLRA does not explicitly prohibit the City*

from acting in the area of labor relations. . . ." 857 F.2d, at 636, Pet. App., at 27a (emphasis added).[23]

The proposition that the NLRA imposes binding obligations only upon management and labor cannot be reconciled with this Court's decision in *Golden State*. No provision of that statute, of course, expressly states that "there shall be no federal, state or local government interference with the bargaining process." But during the more than forty years since the Taft-Hartley Act was passed, this Court repeatedly has construed the NLRA in general, and Section 8(d) in particular, in light of pellucid legislative history,[24] to preclude all governmental

[23] It is remarkable that the Ninth Circuit would have resorted to this test in a case where, by virtue of the Court's prior opinion, the intent of the legislature had been conclusively determined. The proposition that a statute can be read by the Supreme Court in one fashion for purposes of liability and in a completely contrary fashion by the lower courts for remedial purposes has no foundation in the law, and requires the unprecedented assumption that Congress deliberately intended to create statutory rights that are not effectively remediable. We suggest that the appropriate assumption—and one that finds overwhelming support in this Court's decisions—is that federal rights are fully remediable, under Section 1983 or otherwise, absent a clear congressional indication to the contrary.

[24] The legislative history of the Wagner Act is filled with explicit statements by the Act's proponents denying that any party could be compelled to reach agreement under the new law. The Senate report on the bill that became the Wagner Act expressly addressed this issue:

> The Committee wishes to dispel any possible false impression that the bill was designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, *because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.*

S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935) (emphasis added). The Act's author, Senator Wagner, expressed an identical understanding:

> Most emphatically this provision does not imply governmental supervision of wage or hour agreements. It does not compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory to him. *The very essence of collective bargaining is that either party shall be free to withdraw if its conditions are not met.*

79 Cong. Rec. 7571 (1935) (emphasis added). *See also* 79 Cong. Rec. 7659 (remarks of Sen. Walsh) (1935). The legislative history of Section 8(d) was reviewed in detail, and was the basis for the Court's decisions, in *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103-06 (1970), and *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 485-87 (1960). *See generally* Comment, *The Radical Potential of the Wagner Act: The Duty to Bargain Collectively*, 129 U. Pa. L. Rev. 1392, 1401-09 (1981); Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1406-09 (1958).

interference with the bargaining process, thus reinforcing the understanding that freedom of contract lies at the heart of the collective bargaining system.[25] Most critically, as the Ninth Circuit itself recognized, *see* 857 F.2d, at 636, Pet. App., at 26a-27a, this Court so held in this case. *See Golden State*, 475 U.S., at 616, 619, Pet. App., at 9a, 13a ("[T]he language of the NLRA and its legislative history" established that "[t]he settlement condition imposed by the Los Angeles City Council . . . destroyed the balance of power designed by Congress, and frustrated Congress' decision to leave open the use of economic weapons."). Indeed, the Court's ruling in the *Machinists* case, upon which *Golden State* is based, specifically extends Section 8(d)'s express statutory prohibition against coercion by the NLRB to state and local governments:

> Our decisions hold that Congress meant that these activities, whether of employer or employees, were not to be regulable by States any more than by the NLRB . . . . [S]tate attempts to influence the substantive terms of collective-bargaining agreements

[25] *See, e.g., H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103-06 (1970) (concluding that Section 8(d) was intended to preclude the NLRB from compelling concessions in bargaining); *Machinists*, 427 U.S. 132, 149, 153 (1976).

> are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB.

427 U.S., at 149, 153.[26]

In interpreting the National Labor Relations Act, as with Section 1983, the Court properly has concentrated upon ascertaining and effectuating the will of Congress, relying on language, legislative history and "other traditional aids of statutory interpretation", *Wright*, 479 U.S., at 433 (O'Connor, J., dissenting), in its search for meaning. The language of the statute is the starting point for inquiry, but it never has been the sole and exclusive criterion for determining congressional intent. The Ninth Circuit's single-minded reliance upon the verbiage of the statute, to the exclusion of all other indicia of legislative intent, imposes an unnatural and artificial barrier to what must be the task of the courts under Section 1983; to determine, based upon all the available evidence, whether Congress intended to create rights, privileges or immunities enforceable under Section 1983.

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[26] *See also Nash v. Florida Indus. Comm'n*, 389 U.S. 235 (1967), in which the Court held that the State of Florida could not deny unemployment compensation to an employee because he had filed an unfair labor practice charge with the NLRB. The Court noted that Congress had specifically outlawed employer and union discrimination against employees for the filing of such charges, and held:

> We have no doubt that coercive actions which the Act forbids employers and unions to take against persons making charges are likewise prohibited from being taken by the States. The action of Florida here, like the coercive actions which employers and unions are forbidden to engage in, has a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board.

389 U.S., at 239.

B. Section 1983 Relief Must Be Available Where State or Local Conduct Penalizes the Exercise of Federal Statutory Rights.

This Court has discussed on many occasions the various ways in which the Supremacy Clause may preempt state or local conduct.[27] In particular, the Court has distinguished between cases where the Supremacy Clause is used to preserve deliberate congressional judgments protecting specific private conduct from government sanction, and preemption cases in which the Supremacy Clause is relied upon for other purposes. In *Brown v. Hotel & Restaurant Employees*, 468 U.S. 491 (1984), for example, the Court discussed the various forms of preemption and held that labor cases involve "actual conflict" preemption when they challenge state or local attempts to interfere with conduct protected by Congress under the federal labor laws:

> The Court has, however, frequently applied traditional pre-emption principles to find state law barred on the basis of an actual conflict with § 7. *If employee conduct is protected under § 7, then state law which interferes with the exercise of these federally protected rights creates an actual conflict and is pre-empted by direct operation of the Supremacy Clause.*

468 U.S., at 501 (emphasis added). The *Brown* Court then underscored the difference between *Garmon* preemption (based in part upon preserving the primary jurisdiction of the NLRB) and preemption cases involving specific statutory commands that create "actual federal protection of the conduct at issue," *id.*, at 502. The Court stated:

> *If the state law regulates conduct that is actually protected by federal law, however, preemption fol-*

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[27] *See, e.g., Brown v. Hotel & Restaurant Employees*, 468 U.S. 491 (1984); *Michigan Canners and Freezers Ass'n v. Agricultural Mktg. and Bargaining Bd.*, 467 U.S. 461 (1984); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982).

> *lows not as a matter of protecting primary jurisdiction, but as a matter of substantive right.* Where, as here, the issue is one of an asserted substantive conflict with a federal enactment, then "[t]he relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that the federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962).

468 U.S., at 503 (emphasis added).[28] *See also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213-14 n.9 (1985); *Machinists*, 427 U.S., at 138.

There is a significant difference between a preemption claim seeking to preclude good faith state or local regulation in an area of pervasive federal concern,[29] and a preemption case—like this one—in which the Supremacy Clause is relied upon to preserve specific congressional authorization of private conduct from state or local interference. In the latter case, the Supremacy Clause is used as a shield to protect individuals whose rights have been determined by specific congressional judgments made in the context of a statutory scheme independent of the Supremacy Clause itself. In the former case, Congress may not have made any judgments as to the manner in which private individuals may act, and thus the Supremacy Clause operates as a sword to invalidate state or local action that might intrude into an area in which Congress may someday choose to legislate.

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[28] In support of its conclusion in *Brown*, the Court cited four cases—*Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 239-40 (1967); *Bus Employees v. Missouri*, 374 U.S. 74, 81-82 (1963); *Bus. Employees v. Wisconsin Employ. Rel. Bd.*, 340 U.S. 383, 394 (1951); and *Automobile Workers v. O'Brien*, 339 U.S. 454, 458-59 (1950)—two of which were expressly relied upon by this Court in reaching its earlier decision in this case. *Compare Brown*, 468 U.S., at 502, *with Golden State*, 475 U.S., at 618, Pet. App., at 11a.

[29] *See, e.g., City of New York v. FCC*, —— U.S. ——, 108 S. Ct. 1637 (1988); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

Whether one has a Section 1983 right to be free from excessive local regulation in an area of pervasive federal concern, or even a right to operate a business in interstate commerce, is not at issue in this case.[30] Here, Congress has specifically determined that employers and labor unions have a right to bargain and use economic weapons against one another without government interference. The purposes of both the Supremacy Clause and Section 1983 demand that where Congress endows private parties with the right to act in a particular fashion, its decisions may not be set aside to the detriment of citizens who have acted in reliance thereon.

The Ninth Circuit, purporting to apply a test initially employed in one of its prior decisions,[31] concluded that Section 1983 relief was inappropriate here because this case did not involve an "actual conflict" with federal law, but rather was akin to a preemption case involving "field occupation." The test applied by the Ninth Circuit, loosely based upon the distinction between "rights-conferring" as opposed to "power allocating" provisions employed by Professor Jesse Choper in *Judicial Review in the National Political Process* (1980), at 174-75,[32] cannot be

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[30] For this reason, the Court need not decide in this case whether Commerce Clause claims fall under Section 1983, a question upon which the lower courts are divided. *Compare Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982); *Kennecott Corp. v. Smith*, 637 F.2d 181 (3d Cir. 1980) (Commerce Clause claims arise under Section 1983) *with J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985); *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984) (Commerce Clause claims do not sound under Section 1983).

[31] *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir. 1985), *cert. denied*, 479 U.S. 1060 (1987).

[32] *See White Mountain Apache Tribe v. Williams, supra*, 810 F.2d, at 848. Wholly apart from the incompatibility of Professor Choper's test with the purposes of Section 1983, discussed in the text, Professor Choper's book argues that the federal courts should abstain totally in preemption cases involving "power allocation" between various levels of government, allowing the federal, state and local levels to resolve their own differences. That proposal does not ac-

the criterion for determining whether Section 1983 relief is available in preemption cases, for two distinct reasons. First, Section 1983 applies where an individual has been deprived of "rights, privileges and immunities" secured by the Constitution and laws of the United States. There may be many cases of an "actual conflict" between federal and state or local law in which no individual is deprived of a "right, privilege or immunity." The proper inquiry under Section 1983 is not an artificial determination between "actual conflict" or "field occupation" preemption, but rather lies in determining whether Congress intended, in the underlying statute, to endow private parties with the right to act in a particular fashion.

Second, the "actual conflict" test is based upon terms that are not precise enough for decisional purposes. Many terms have been used by this Court, and the lower courts, in preemption cases, in widely disparate contexts. The distinction between "field preemption", "actual conflict" and "conflict with federal goals or purposes" simply is not of sufficient clarity to be relied upon as the determinant of Section 1983 relief. *Cf. Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).[33] We agree, of course, that where state or local conduct sets aside a deliberate congressional determination that individuals are free to act in a particular fashion without government sanction, an "actual conflict" supporting Section 1983 relief has occurred. This is true, however, not because an "actual conflict" has been created, but because Section 1983 relief is required to vindicate

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cord in any way with established Supremacy Clause doctrine, which since *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), has seen the federal courts decide when and in what circumstances state and local action must yield to federal law.

[33] For example, in *Nash v. Florida Indus. Comm'n*, 389 U.S. 235 (1967), a case cited as an example of "actual conflict" preemption both by the Court and commentators, *see infra*, at 34, the Court never used the term "actual conflict". Rather, the incompatibility between federal and state law was said to "frustrate the purpose of Congress", 389 U.S., at 239.

the decision of Congress to preserve specific private conduct from government sanction.

Even if the Ninth Circuit's test were correct, however, its determination that this case involves "field preemption" is wrong as a matter of law. The Court in *Brown v. Hotel & Restaurant Employees, supra*, made it clear that labor cases do not involve "field occupation" because Congress has not seen fit to occupy the entire field of labor-management relations:

> Section 7 of the NLRA, 49 Stat. 452, as amended, 29 U.S.C. § 157, the provision involved in this case, neither contains explicit pre-emptive language *nor otherwise indicates a congressional intent to usurp the entire field of labor-management relations. See New York Telephone Co. v. New York State Dept. of Labor*, 440 U.S. 519, 540 (1979); *Garner v. Teamsters*, 346 U.S. 485, 488 (1953) ("The national. . . Act. . . leaves much to the states, though Congress has refrained from telling us how much").

468 U.S., at 501 (emphasis added). *See also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985); *Bus Employees v. Lockridge*, 403 U.S. 274, 289 (1971) ("We cannot declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States."); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480 (1955).

Labor cases in general (and this case in particular) do not involve "field occupation" preemption.[34] Congress

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[34] Golden State does not suggest that every labor preemption case would support a Section 1983 damage remedy. As the Court stated in *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 187-88 (1978), the *Garmon* doctrine is based upon two congressional judgments: first, that certain conduct is to be protected or prohibited under federal law; and second, that proper administration of federal labor law requires that the NLRB exercise primary jurisdiction to interpret the law's commands. Thus, a *Garmon* preemption case might not involve an actual conflict with a substantive right granted by Congress, but rather a "potential for

has *not* merely "occupied the field" of labor relations and collective bargaining, preserving congressional lebensraum for future specific regulation. Congress has rather endowed both management and labor with specific rights—the right to bargain, based upon freedom of contract rather than government coercion, and the right to employ economic force against one another to resolve their differences—authorizing them to act without fear of government sanction. Several labor cases illustrate this point, including *Nash v. Florida Indus. Comm'n*, 389 U.S. 235 (1967), a case cited by the Court as an example of "actual conflict" preemption in *Brown v. Hotel & Restaurant Employees*, 468 U.S., at 501-02. *See also* L. Tribe, *American Constitutional Law* 378 (1978). In *Nash*, an employee was held to have been wrongfully denied unemployment compensation under Florida law, where the denial was attributable to the employee's having filed a charge under the National Labor Relations Act. The Court held that a state could not penalize an employee for exercising rights guaranteed him under federal law. By a parity of reasoning, the City cannot punish Golden State for exercising its rights under federal law, and its having done so creates an "actual and direct conflict" fully remediable under Section 1983.[35]

Thus, the NLRA (and specifically Section 8(d), as interpreted by this Court) "occupies the field" with respect to collective bargaining only in the same, limited

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jurisdictional conflict between state courts or agencies and the NLRB. . . ," *Brown v. Hotel and Restaurant Employees*, 468 U.S., at 502. The present case plainly involves no such potential jurisdictional conflict, and the question whether a Section 1983 action would lie in such a case need not be resolved here.

[35] *See also Bus Employees v. Missouri*, 374 U.S. 74 (1963) and *Bus Employees v. Wisconsin Employ. Rel. Bd.*, 340 U.S. 383 (1951), cases both cited by the Court in *Brown* as examples of "actual conflict" preemption, 468 U.S., at 501-02, and specifically relied upon by the Court in *Golden State* as precedent for the Court's holding. 475 U.S., at 618, Pet. App., at 11a.

sense that the First Amendment "occupies the field" in relation to freedom of speech. In each instance, a provision of federal law imposes an obligation in the form of a broad negative injunction, preventing governmental interference with specific private conduct. In each case, enforceable rights are created.[36]

III. COMPENSATORY DAMAGES ARE NECESSARY TO REDRESS GOLDEN STATE'S INJURIES AND DETER FUTURE VIOLATIONS.

The instant case illustrates precisely why Section 1983 relief must be available in preemption cases involving congressional protection of private conduct. Refusal to allow Golden State a complete remedy under Section 1983 sacrifices vitally important policies under both Section 1983 and the National Labor Relations Act.

The dual purposes of damage awards under Section 1983—compensating victims of unlawful deprivations and deterring future misconduct—mandate an award of damages in the present case. Compensatory damages are the only means to rectify fully Golden State's injuries. Granting an injunction (even accompanied by the illusory ancillary relief envisioned by the district court) to a business unlawfully destroyed years ago does not even begin to restore the status quo and ignores the years of lost profits and competitive harm caused by the City's illegal conduct. Yellow Cab of Los Angeles was the largest and oldest taxicab company in the City, operating more than 400 cabs with a legacy of service to the community dating back to the 1930's. Today, as a result of the City's misconduct, its business has been liquidated, and it has no cabs, no related equipment, and no employees with which

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[36] *See Valley Forge Christian College v. Americans United for Separaton of Church & State, Inc.*, 454 U.S. 464, 493 n.5 (1982) (Brennan, J., dissenting) ("When the Constitution makes it clear that a particular person is to be protected from a particular form of government action, then that person has a 'right' to be free of that action. . . ."); O.W. Holmes, *The Common Law* 169 (1945).

to resume operations. Injunctive relief in this case is plainly inadequate.[37]

The federal courts traditionally have granted compensatory relief to injured parties in Golden State's circumstances. This Court has recognized that the legislative history of Section 1983 "demonstrates that it was intended to '[create] a species of tort liability' in favor of persons who are deprived of 'rights, privileges or immunities secured' to them by the Constitution." *Carey v. Piphus*, 435 U.S. 247, 253 (1978) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)). This case has all the earmarks of a classic municipal tort. It involves a specific action by the City, directed toward Golden State alone, the purpose and effect of which was to punish Golden State for insisting upon the exercise of its federal rights. The injury inflicted by the City—destruction of a business—is not significantly different from injuries typically involved in federal cases, ranging from antitrust to takings. The business-injury issues involved in calculating Golden State's damages—assigning a value to its business and estimating lost profits during the years that the company improperly was prevented from operating—are garden variety issues addressed regularly by the federal courts.

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[37] The City's own conduct exacerbated the need for a damage remedy. In 1983, once the preliminary injunction was overturned on appeal and the district court refused to renew the prohibition, the City immediately issued a cease and desist order to Golden State, forcing its cabs off the street and the company into liquidation. The City had no pressing reason for this conduct; the strike was not harming the public, as the evidence in the record illustrates that any slack created by Golden State's absence was being met by existing operators. J.A., at 72-73. The City should not be heard to argue that injunctive relief is the appropriate remedy for Golden State's injuries where it was the City's own intemperate action, taken in the midst of a serious legal challenge, that put Golden State out of business and created an even more pressing need for compensatory damages.

We do not ask the courts to assign a value to inchoate constitutional rights or to award damages for presumed injury. *See Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986); *Carey v. Piphus*, 435 U.S. 247 (1978). Neither does the compensatory relief we seek implicate manageability concerns that might arise in a case challenging good-faith state or local regulation affecting a broad segment of the business community. We do not seek damages on behalf of an ill-defined and unwieldy class of regulatees, but rather specific, traditional and necessary relief on behalf of one individual business singled out and punished for conduct immunized from sanction by Congress.[38]

Allowing Section 1983 relief in the present case would serve important deterrent functions as well. Unless damages are available here, no employer will dare to defy municipal attempts to influence collective bargaining, for the very survival of its business will rest solely upon its ability to obtain injunctive relief in time to prevent its legislated extinction.[39] If the policy of freedom of con-

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[38] This case comes before the Court on a certified question of judicial authority to entertain a Section 1983 suit at all. We fully acknowledge that Golden State and any other plaintiff raising a preemption claim under Section 1983 is obligated to prove its claim at trial under normally applicable Section 1983 standards, and that a municipal defendant is entitled to raise and argue all appropriate defenses. Any concerns about the effect of a monetary remedy in a preemption case—and we can see none in the circumstances of this case—can be addressed fully by applying Section 1983 standards of proof, rather than by denying Section 1983 relief *ab initio*.

[39] The City gave Golden State several weeks within which to comply with its edict, allowing Golden State to institute this lawsuit prior to the City's final vote to deny the franchise. There is nothing preventing other municipalities, intent upon forestalling a strike that may cause public inconvenience, from establishing such a short deadline for settlement that injunctive relief is effectively foreclosed. In this circumstance, the employer would be left without any remedy whatsoever, and the Court's *Golden State* ruling would be transformed into a dead letter. *Compare Owen v. City of Independence, Mo.*, 445 U.S. 622, 651 n.33 (1980).

tract and the regime of free collective bargaining, which stands as "the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA," 475 U.S., at 619, Pet. App., at 12a (quoting *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 551 (1979) (Powell, J., dissenting)), is to have any substance whatever, both management and labor must be assured that they are fully protected from municipal government coercion in bargaining. A failure to award damages here would permit city governments to manipulate the bargaining conduct of employers and unions with impunity, secure in the knowledge that even though they are depriving the bargaining parties of the freedoms granted by Congress, no monetary remedy can be imposed.

The decision below thus not only denies Golden State its due, but, by failing to create any deterrent to future similar deprivations of rights secured under the NLRA, poses a substantial and direct threat to the bargaining process. This threat is even more serious because the lower federal courts repeatedly have shown a less than complete understanding of labor preemption, an admittedly difficult area in which simple prescriptive rules do not exist.[40] In this very case, where the municipal interference with bargaining was of the crudest kind, the Ninth Circuit twice mistakenly held (using completely different rationales) that the City's conduct was not in conflict with federal labor law.

It also should be recalled that labor preemption has been an extremely active area for the Court. Since 1983,

[40] In *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 619 (1958), the Court stated that "[t]he statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation." *See also Bus Employees v. Lockridge*, 403 U.S. 274, 289-91 (1971) (discussing the Court's difficulty in formulating a useful preemption test in the labor field).

the Court has issued ten labor preemption decisions,[41] and these decisions have yet to be assimilated into a coherent body of law by the lower courts. Moreover, many preemption issues will arise in the state courts, which are likely to be even less familiar with federal labor policies than the federal courts. *See Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987) (removal on the basis of a federal preemption defense is not appropriate); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962) (state and federal courts have concurrent jurisdiction over claims arising under Section 301 of the Labor-Management Relations Act). Losses resulting from lower court misunderstanding of this complex and developing area of the law cannot be allowed to fall upon innocent parties like Golden State instead of upon those who have violated federal law. *Cf. Owen v. City of Independence, Mo.*, 445 U.S. 622, 655 (1980). The absence of a damage remedy in cases like this one, however, ensures that this is precisely where these losses will fall.

Granting compensatory damages in this case thus is necessary to preserve the statutory scheme created by Congress under the National Labor Relations Act, and is fully in accord with the principles and policies underlying Section 1983. A full, effective remedy for Golden State's injuries will not unduly expand or complicate the normal remedial role of the federal courts. Such a remedy requires only that the Court recognize the basic prop-

[41] In addition to *Golden State*, first (*Garmon*) and second (*Machinists*) branch preemption cases have included (in chronological order) *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282 (1986); *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986); *Baker v. General Motors Corp.*, 478 U.S. 621 (1986); and *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). Section 301 preemption cases have included *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987); and *Lingle v. Norge Div. of Magic Chef, Inc.*, —— U.S. ——, 108 S. Ct. 1877 (1988).

osition underlying Section 1983: when a state or local government deprives a citizen of rights granted under federal law, a federal court may provide the relief necessary to make whole the victim and deter future abuses.

CONCLUSION

For the reasons set forth above, Golden State respectfully submits that the decision below be reversed, and this case remanded for determination of damages under 42 U.S.C. Section 1983.

Respectfully submitted,

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RESPONDENT'S

BRIEF

(8)

No. 88-840

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

GOLDEN STATE TRANSIT CORP.,
Petitioner,

vs.

CITY OF LOS ANGELES,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether in the absence of a direct violation of a federal statute, an allegation that municipal conduct is preempted by a federal statute is cognizable under 42 U.S.C. Section 1983.

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No. 88-840

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

GOLDEN STATE TRANSIT CORP.,
Petitioner,

vs.

CITY OF LOS ANGELES,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

Background and Facts

Golden State Transit Corporation, dba Yellow Cab ("Golden State") held a franchise to operate taxicabs in the City of Los Angeles pursuant to approval by the City Council of the City of Los Angeles ("City") under municipal law. Los Angeles Municipal Code, Section 71.02. (App. C-1) The City grants franchises by ordinance and may, by ordinance, grant to the holder of such franchise a new franchise to replace the franchise due to expire, Los Angeles City Charter, Section 3(8)(a) (J.A. 145).

Golden State was not, contrary to what Golden State's Statement of Facts state (Brief, p. 2), "stripped" of its franchise by the City. Golden State's franchise was due to expire by its own terms, as provided in the franchise ordinance, Section 2.2, as amended, on March 31, 1981. Ordinance No. 146,496, as amended by Ordinance No. 154,173 (J.A. 92, 113). The City ordinance granting the franchise contained no provision for a renewal or extension. Since the existing franchise expired by its own terms March 31, 1981, any new franchise ordinance had to be passed and published at least 30 days before that. City Charter, Section 281 provides that an ordinance is not effective until 30 days after publication. (App. B-1)

On February 11, 1981, Golden State's application for a new franchise to replace the expiring one was scheduled for consideration by the City Council. On the same date, the employee-drivers of Golden State, represented by the Teamster's Union, went on strike (J.A. 52), an interim contract having expired at midnight, February 10. The City Council voted unanimously to postpone consideration of the granting of a four-year renewal franchise and continued the matter until February 17, 1981. On February 17, 1981, the City Council passed a substitute ordinance allowing further extension of the franchise to April 30, 1981, provided the City Council were to find on, or before, March 27, 1981, that such a 30-day extension was in the best interest of the City (J.A. 10-11). During that time, Golden State had full legal authority to operate its taxicabs within the City, but did not hire strike replacements and thus had no taxicabs on the street (J.A. 82).

The matter came before the City Council again on March 23, 1981. At that meeting the representative of the Teamsters did oppose the granting of the new franchise to Golden State replacing the expiring one. But contrary to the impression that Golden State would create by their

brief, the Council meeting was not limited to discussion about the strike. There was also discussion at the Council as to whether or not the taxicab industry in the City of Los Angeles had been improved as a result of the non-operations of Golden State. David Shapiro, President of the United Independent Taxi Drivers, testified that with the non-operation of Golden State drivers were being served and were able for the first time in two and one-half years to make a decent minimal living. He further stated that the doormen of the major hotels of the city reported to him that they were having better quality service with the non-operation of Golden State (J.A. 66.) Mr. Donald Howery, the General Manager of the City's Department of Transportation, the Department which regulates taxicabs, stated that the Department had not received any complaints with the non-operation of Golden State and that prior to the strike there were too many taxicabs operating on the street (J.A. 73). Councilman Zev Yaroslavsky stated that the City may be actually creating a more healthy market place in the taxicab industry with the non-renewal of Golden State's franchise. He further stated that he could see where the parties to the strike, Golden State and the union, would want to use the City Council's leverage but he was looking at it from the point of view as to how the public was best served (C.J.A. 74). Councilman Ernani Bernardi stated that if the franchise was continued for another 30 days the Council would be accused of being on the side of Golden State and if they refused to continue, the Council would be accused of being on the side of the drivers. He further stated, however, that he didn't see how having them stay out of work would be on their side, they being out of a job (J.A. 85). He concluded that he was going to remain neutral by voting against the 30-day extension (J.A. 86.) Councilwoman Russell, the maker of the motion to continue the franchise for 30 days stated that she thought the

Council would like to be neutral in terms of the labor dispute. She further stated that "simply by observing, you do effect the events" and she thought this would be "the case on this one", and that the Council would "not be seen to be neutral even if those are our motivations". She pointed out that there had not been an outcry because of the lack of service during the strike (J.A. 88). The motion to extend the franchise for another 30 days was defeated by a vote of eleven to one (J.A. 49, 158).

Golden State, on page 5 of its brief, makes reference to a finding by a trial court after the initiation of its lawsuit that it was "undisputed that the sole basis for refusing to extend plaintiff's franchise was its labor dispute with its Teamsters drivers", 520 F.Supp. 191, 193 (CD. Cal. 1981); *Id.*, at 193-194. Golden State further contends that the City Council "insisted upon resolution of the dispute as a condition to franchise renewal", a finding that has repeatedly been affirmed on appeal." 754 F.2d 830, 833 (9th Cir. 1985).

The Court of Appeals, at 754 F.2d 830, 833, did state that the City insisted upon resolution of the dispute as a condition to franchise renewal. This was stated, however, after the Court's observation in footnote 1, p. 832, that in reviewing the district court's grant of a summary judgment to the City, the reviewing court views the evidence in the light most favorable to Golden State. The record, however, does not support the conclusion that the action of the City Council was the conditioning of the renewal of the franchise on the settlement of the strike. The record does not show any such action of the City Council.

Golden State states that on April 29, 1983, after the denial by the District Court of injunctive relief,[1] the date the City served the cease and desist order upon Golden State, Golden State was involved in an involuntary Chapter 11 reorganization initiated by one of its creditors which was subsequently converted to a Chapter 7 liquidation (Golden State's Brief, p. 6, fn. 4). Golden State had been operating, even though they had no franchise, pursuant to an injuction granted by the district court (Golden State's Brief, p. 6). The records of the bankruptcy proceeding, however, state that the involuntary Chapter 11 proceeding commenced on February 18, 1981 and was converted by Golden State itself into a voluntary Chapter 11 proceeding on August 10, 1981. On March 7, 1985, the proceeding was converted into a Chapter 7 liquidation (L.A. 81-01812 JD).

This Court's Previous Ruling

This Court in its previous opinion, *Golden State Transit Corporation v. City of Los Angeles*, 475 U.S. 608 (1987) did state at pp. 615-616, fn. 6, that an objective fact which supported the purported finding that the renewal was subject to the condition of the settlement of a strike was that the Council's agent, namely the Assistant City Attorney, had revealed that the condition was City policy. With all due respect the record does not indicate that the Assistant City Attorney stated that he made any such representation to the parties. The dialogue at the City Council which apparently led this Court to that conclusion is as follows (J.A. 70-71):

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[1]The District had initially granted a preliminary injunction, upon the filing of the law suit. That was overturned, however, on appeal. 686 F.2d 758 (9th Cir. 1982).

BY MR. JOHN HAGGERTY (Assistant City Attorney:

Yes. As and now the franchise dies March 31st.

BY MR. CUNNINGHAM (City Councilman):

And if there is an action before March 31, the Council can respond? Right?

BY MR. JOHN HAGGERTY:

Well, the Council would have to make the necessary finding by this Friday at the latest for the extension to go until the end of April. For it to go beyond the end of April, a second ordinance or new ordinance would also have to be passed and published by the end of this month.

BY MR. CUNNINGHAM:

So you are saying on Friday the Council could take action that would still give a timely activity to the extension of the franchise.

By MR. JOHN HAGGERTY:

Well, yes. Council (sic) has to make the necessary findings by this Friday at the latest to extend the franchise to April 31. For the franchise to be extended beyond that an ordinance would also have to be passed and published by the end of (sic) this month.

UNKNOWN:

Well, I think . . .

By MR. CUNNINGHAM:

Has this been clearly stated to the parties at odds in this matter?

BY MR. HAGGERTY:

It has been clearly stated (sic) to those people who have contacted me and asked me, yes."

The finding referred to was a finding that it was in the best interest of the City to allow for the 30-day extension. The records shows that the Assistant City Attorney was responding to a question as to whether the parties had been informed that the Council had to make the necessary finding by Friday and that the Ordinance had to be passed and published by the end of the month. Golden State, itself, has never claimed during the course of this litigation that the Assistant City Attorney made any statements telling any of its representatives that the strike had to be settled for the franchise to be renewed.

Golden State, in this proceeding, is claiming the right to compensatory damages. If Golden State suffered any damages it would be the result of the non-renewal of the franchise. This Court, however, in *Golden State*, at p. 619, stated that its holding did not require the City to renew or to refuse to renew any particular franchise.

Post-Remand Proceedings

Golden State, in its Brief, p. 8, fn. 6, stated that in the post-remand summary judgment proceedings in the district court, the City did not present any evidence in opposition to the motion. To the contrary the City's opposition made reference to the record of the Council proceedings on file with the court. It was pointed out that though four members of the Council arguably endorsed the position that the strike should be settled before the renewal franchise would be granted, there were 11 votes against the renewal. The City's opposition further pointed out that there was the other evidence before the Council prior to their final action as indicated in the foregoing

statement of facts. The only evidence of the Council's action is the Council's proceedings itself.

SUMMARY OF ARGUMENT

I. The Supremacy Clause does "secure" federal rights by affording them priorities whenever they come in conflict with state and local laws and actions. But if, because of this, the Supremacy Clause came within the provisions of Section 1983 the phrase "and laws" in that section would be redundant. If rights, privileges or immunities exist they must arise from the federal statute itself. The Supremacy Clause is a power conferring provision. It does not establish the relationship of a citizen to his or her government.

II. The Supreme court, in its earlier decision, found the City's alleged action preempted. In engaging in such an analysis the courts can go beyond the explicit language of the statute. The explicit language of the statute, namely Section 8(d) of the NLRA, however, did not protect or secure any right, privilege or immunity that precluded the City from engaging in such action for the purpose of Section 1983 liability. The statute only exempted Golden State from a charge of an unfair labor practice in refusing to settle the strike. Before there can be a violation the statute should have clear mandatory language. The City did not violate the statute so as to be subject to liability under Section 1983.

III. Golden State had no right to the renewal of the franchise. The City had legitimate transportation reasons for not renewing. In taking such action the alleged motive of the individual Council members were irrelevant.

ARGUMENT

GOLDEN STATE IS NOT ENTITLED TO SECTION 1983 RELIEF

I.

THE SUPREMACY CLAUSE DOES NOT, IN ITSELF, GIVE RISE TO A CLAIM SECURED BY THE CONSTITUTION WITHIN THE MEANING OF SECTION 1983

This Court, in *Golden State*, ruled that the City was preempted from conditioning the renewal of the franchise on the settlement of the strike. Such a condition, this Court said, contravened congressional intent, as demonstrated by the language of the National Labor Relations Act ("NLRA") and its legislative history. Specific reference was made to Section 8(d) of the Act as amended, 29 U.S.C. 158(d). Section 8 defines what constitutes an unfair labor practice for either an employer or employee. The relevant language of Section 8 provides that the duty to bargain in good faith and thus not commit an unfair labor practice "does not compel either party to agree to a proposal or require the making of a concession", 475 U.S. at p. 616. Section 8 defines prohibited conduct under the NLRA which will subject an employer or employee to a charge before the National Labor Relations Board of an unfair labor practice.[2] Though the City's action was not in violation of the terms of Section 8, the section being applicable only to an employer or employee Golden State

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[2]Golden State criticizes the Ninth Circuit in the decision below for injecting the primary jurisdiction of the NLRB into the case (Brief, p.23, fn. 21). What the Ninth Circuit was saying however was that if there was a violation of Section 8 it would be an unfair labor practice subject to the exclusive jurisdiction of the NLRB. The point the Ninth Circuit was making was that this showed that the City, being neither employer or employee, could not violate Section 8.

claims that it nevertheless has an action pursuant to 42 U.S.C. Section 1983.

This Court found that the City's action was preempted pursuant to the Supremacy Clause. Golden State argues that since that Clause is the "deus et machina" by which the federal Constitution and statutes are made binding upon state and local governments, every Section 1983 case involves some form of preemption under the Supremacy Clause. Consequently, it asserts, the Supremacy Clause is, therefore, one of the constitutional provisions covered by the phrase "secured by the Constitution" as used in Section 1983. But the conclusion of the above proposition does not follow from its premise. By such logic, Golden State would transform every statutory claim into a constitutional claim. A similar analysis was rejected in *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979) wherein this Court concluded that for the purposes of 28 U.S.C. Section 1343(3) the Supremacy Clause was not a constitutional provision that secured rights, privileges or immunities.

Under Section 1343(3) Congress had created federal jurisdiction of any civil action authorized by law to redress the deprivation under color of law "of any right, privilege or immunity secured (1) by the Constitution of the United States or (2) by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." In *Chapman*, an issue was whether the Supremacy Clause was a constitutional provision included within the above-quoted first prepositional phrase of Section 1343(3). The Court concluded that though the Clause does "secure" federal rights by according them priority whenever they come in conflict with state law if all federal rights whether created by treaty, by statute, or by regulation are therefore "secured" by the Supremacy Clause within the meaning of

the first prepositional phrase of Section 1343(3) the phrase "secured by any Act of Congress" (the second prepositional phrase) would be superfluous (441 U.S. at p. 613-615). Consequently, this Court concluded that in order to give meaning to the entire statute, as written by Congress, the Court must conclude that the allegation of incompatability between federal and state statutes and regulation does not, in itself, give rise to a claim "secured by the Constitution" within the meaning of Section 1343(3) (441 U.S. at p. 615). Contrary to what Golden State asserts (fn. 12 of its Brief, p. 4), *Maine v. Thiboutot*, 448 U.S. 1 (1980) did not alter *Chapman's* interpretation of that first prepositional phrase of Section 1343)(3).

The language of this first prepositional phrase of Section 1343(3) is similar to the phrase of Section 1983 that refers to rights, etc. secured by the Constitution. The Court ruling in *Maine v. Thiboutot* related, however, to the other phrase in Section 1983 "and laws" which is broader in its language than the second prepositional phrase in Section 1343(3) insofar as the latter only relates to statutes providing for equal rights. Consequently, the Court in *Maine v. Thiboutot* gave a broader definition to the second prepositional phrase in 1983 than *Chapman* did to the second prepositional phrase in Section 1343(3). The decision in *Maine v. Thiboutot*, however, does not contradict what *Chapman* said in reference to the Supremacy Clause, not, in itself, giving rise to a claim secured by the Constitution within the meaning of Section 1343(3).

In accordance with the reasoning of this Court in *Chapman*, the phrase "secured by the Constitution" in Section 1983 was not intended by Congress to include the Supremacy Clause though it is the clause that "secures" federal rights by according them priority whenever they come in conflict with state and local action. When a

federal statute is involved, the rights, privileges, or immunities, arise, if they do arise, not from the Supremacy Clause, but rather, where they exist, from the federal statute itself. Otherwise the phrase "and laws" in Section 1983 would be redundant. See Nahmod, *Civil Rights and Civil Liberties Litigation*, 54-55 (1976).

The Congressional debate on the Civil Rights Act of 1971, of which Section 1983 is a part, indicates that Section 1983 was not intended to encompasss those constitutional provisions which allocate powers between the state and local government. In the Congressional debate discussed in *Monell v. Department of Social Services of the City of New York* 436 U.S. 658 (1978), Representative Shellabarger, acting for a House select committee, reported H.R. 320. This Bill contained four sections. Section 1, now codified as 42 U.S.C. 1983, was the subject of only limited debate and was passed without amendment. One of the amendments, however, to another part of the Bill, the Sherman amendment, gave a cause of action to any person injured by:

> "... any person riotously and tumoltously assembled together ... with intent to deprive any person of any right conferred on him by the Constitution and laws of the United States ... 436 U.S. at p. 666.

In the debate on the Sherman amendment, Congressman Shellabarger stated:

> "[Congress has always] assumed to enforce, as against the States, and also persons, every one of the provisions of the Constitution. Most of the provisions of the Constitution which restrain and directly relate to the States, such as those in [Art. 1, § 10] relate to the divisions of the political powers of the State and General Governments.... These prohibitions upon political powers of the States are all of such a nature

> that they can be, and even have been ... enforced by the Courts of the United States declaring void all State acts of enroachment on Federal powers. Thus, and thus sufficiently, has the United States 'enforced' these provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or the liabilities of persons within the States, as between such persons and the States." 436 U.S. at pp. 670-671.

The Sherman Amendment was meant to apply to "any right conferred on [a person] by the Constitution and laws of the United States". Congressman Shellaberger's comments distinguished those rights or liabilities secured by the courts as between such persons and the States, and those which relate to the division of powers of the State and General Government. The implication of these remarks is that federal courts were sufficiently enforcing the latter, which would include the Supremacy Clause, and, therefore the Sherman Amendment's reference to rights conferred "by the Constitution" would not include the Supremacy Clause. Though the Congressman's statements were made in reference to the Sherman Amendment they can be used to interpret the provision of Section 1, codified as Section 1983 relating to rights, etc. secured by the "Constitution". The rule of *in pari materia* allows for the implication that since the federal courts were sufficiently enforcing the Supremacy Clause Section 1983, likewise, was not meant to include the Supremacy Clause within its provisions. *Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972).[3]

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[3]In *Erlenbaugh*, the Court stated that the rule of *in pari materia*, as a canon of statutory construction, allows for the implication that a legislative body uses a particular word with a consistent meaning in a given context. Consequently, in the Civil Rights Act of 1871 the constitutional provisions meant to be included within the word

The cases cited by Golden State for the proposition that Section 1983 should be given a broad interpretation (Brief, p. 15) so as to include the Supremacy Clause involve the Fourteenth Amendment. The procedural safeguards referenced in *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986) are those guaranteed by the Due Process Clause. The Fourteenth Amendment and the Supremacy Clause, however, serve different purposes. Professor L. Tribe has observed that unlike those constitutional provisions that establish the relationship of the citizen to government power in general . . . the Supremacy Clause defines the hierarchy of federalism. L. Tribe, *Constitutional Law*, 401 (1986). The primary function of the Supremacy Clause is to define the relationship between the state and federal law. It is essentially a power conferring provision, one that allocates authority between the national and state governments.

The City is not saying, as Golden State contends, that there can never be relief under Section 1983 in a preemption case. Merely because there is a finding of preemption, pursuant to the Supremacy Clause, however, does not, in itself, allow for relief under Section 1983.

II.

THE CITY DID NOT VIOLATE THE NATIONAL LABOR RELATIONS ACT

This Court, in *Golden State,* ruled that the City's purported action in conditioning the renewal of the franchise on the settlement of the strike had frustrated effective implementation of the NLRA's processes. In finding that the City's alleged action was preempted, the Court focused on Section 8(d) of the Act, as amended, 29 U.S.C.

"Constitution" in both Section 1 and the Sherman Amendment were the same. (In *Erlenbaugh* this rule that they stated was not applied to the statutes at issue in the case).

Section 1858(d), 475 U.S., pp. 615-616.[4] The Question Presented to the Court in this proceeding uses the phrase "direct violation" of a federal statute. Golden State questions the meaning of that term "direct violation", insofar as it implies that a statute can be violated either "directly" and "indirectly" (Golden State's Brief, p. 25). The City does not necessarily disagree with Golden State on this point insofar as it is not clear what an indirect violation would be.[5] This Court, however, has discussed Section 1983 in terms of "violations" of federal statutory and constitutional law (*Maine v. Thiboutot,* 448 U.S. 1, 4 (1980)). In this case there was no violation by the City of the explicit provisions of Section 8(d).

In reviewing the City's action in *Golden State,* this Court engaged in a preemption analysis which involves specifically, under the directive of the Supremacy Clause, an attempt to "examine the presumed intent of Congress." *Brown v. Hotel & Restaurant Employees & Bartenders,* 468 U.S. 491, 500 (1984). In engaging in such an analysis courts go beyond the explicit language of the federal statute to ascertain such intent. This Court concluded, after such an analysis, that in order to prevent

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[4]Section 8(d) provides (Section 8 is titled "Unfair Labor Practice"):

(d) "*For the purposes of this section* to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such *obligation*, does not compel either party to agree to a proposal or require the making of a concession; . . ."
(Emphasis added.)

[5]The phrase "direct violation" was used in the decision below.

frustration of the "effective implementations of the NLRA's processes" the City's alleged action was, pursuant to the *Machinist* doctrine, preempted. 475 U.S. at p. 615. Whether or not a federal statute was, in fact, violated is not the issue in a preemption analysis. In a Section 1983 action involving a federal statute, however, the question is whether or not a statute creating enforceable rights was violated. *Maine v. Thiboutot,* 448 U.S. 1, 4 (1980).

The language of the NLRA relied upon this Court to find preemption was Section 8(d) that states that the obligation to bargain collectively, and *thus not commit an unfair labor practice* "does not compel either party to agree to a proposal or require the making of a concession." The language of that particular provision does not secure any right, privilege or immunity of an employer or employee against state or local regulation. All it does, and all it is meant to do, by its language, is to take such refusal by an employer or employee to reach an agreement outside of the prohibitions of Section 8 and thus not subject such party to a charge of an unfair labor practice. *Machinist* preemption, by definition, is applicable when the state or local entity is attempting to regulate activity that is neither prohibited nor protected under the NLRA. *Metropolitan Life Ins. v. Massachusetts,* 471 U.S. 724, 750 (1980).

Golden State cites the case of *Brown v. Hotel and Restaurant Employees,* 468 U.S. 491 (1984) wherein the federal statute at issue was Section 7 of the NLRA; 29 U.S.C., Section 157. Section 7, however, is a provision of the NLRA which constitutes a specific congressional authorization securing the rights of employees to engage in certain activities. This is conduct actually protected by federal law and, in fact, highlights the distinction between such protected conduct and Golden State's conduct

in the present case which was not protected by the explicit provisions of the NLRA. Rather, Golden State's conduct was deemed "protected", pursuant to a preemption analysis, in order to fulfill a congressional purpose.

Though the Court has said that Section 1983 is to be interpreted liberally since it is a remedial statute it is still only a vehicle for substantive claims that have their basis elsewhere. The section is not an independent source of constitutional or statutory rights. Blackmun, *Section 1983 and Federal Protection of Individual Rights — Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L.Rev. 1, 22 (1985). That source must be, pursuant to Section 1983, the Constitution or laws.

Contrary to what the American Trucking Association ("ATA") implies, when Congress intends to confer personal rights it is capable of using words that clearly express its purpose and fully describe the entitlement created.[6]

As Golden State itself admits, in labor preemption cases "the statutory implications concerning what has been taken from the States and what was left to them are of a Delphic nature, to be translated into concreteness by

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[6]The ATA, in its Brief, fn. 4, p. 12, states that Congress may have concluded that an express preemption provision is unnecessary where such a provision would simply reiterate the usual preemption rules. Maybe that is true from the standpoint of preemption but it should not be accepted from the standpoint of Section 1983 liability. The two cases cited in the brief are not relevant to the proposition ATA is presenting. In *Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979), the court stated that the drafters of Title IX of the Civil Rights Act had *explicitly* assumed that it would be applied to Title VI of the same act. In *Welch v. Texas Department of Highways*, 107 S.Ct. 2941, 2958 (1987), Justice Scalia makes reference to the Congress in legislating assuming certain facts based on a particular court decision.

the process of litigating elucidation." *International Assn. of Machinists v. Gonzales*, 356 U.S. 617, 619 (1958). Golden State's Brief, p. 38, fn.40.

Golden State criticizes the Ninth Circuit's "single-minded reliance upon the verbiage of the statute." (Golden State's Brief, p. 28.) But in any case involving the interpretation of the statute, the analysis must begin with the language of the statute itself. *Touche Ross & Company v. Redington*, 442 U.S. 560, 568 (1979). Section 8(d) is certainly not an ambiguous statute. Its meaning is clear.

Judge Alarcon, though concurring with the decision of the lower court, in this case, expressed reservations because of this Court's decision in *Wright v. City of Roanoke Redev. & Housing Auth.*, 479 U.S. 418 (1987).

In *Wright*, the applicable statute imposed a rent ceiling for rents charged to low-income people living in public housing projects. By the terms of the statute this created an obligation on anybody charging such rents upon such persons. The decision specifically stated, as to the rent limitation, that the statute could not be clearer as to the maximum rent which could be charged. "This was a mandatory limitation focusing on the individual family and its income." 479 U.S. at p. 430. The mandatory provisions of Section 8 of the NLRA, on the other hand, apply specifically, and *only*, to the employer and employee labor organizations. Section 8 of the NLRA defines conduct which would constitute an unfair labor practice and Section 8(d), as amended, which was the basis of the *Machinist* rule of preemption being applied to the City's action (*Golden State*, 475 U.S. at p. 614, Pet.App. p. 7a), defines conduct of an employer which would not constitute an unfair labor practice, nothing more.

In footnote 18 of Golden State's Brief, Section 1(b) of the Taft-Hartley Act, 29 U.S.C. Section 141(b) (1982) is quoted, in part, for the proposition that it is the purpose of the NLRA to prescribe the legitimate rights of employees and employers. Thus, Golden State argues, the NLRA was for the "especial benefit" of Golden State, as an employer. It is true that the section states that but it goes on to qualify that prescriptions by the phrase "in *their relations* affecting commerce." (Emphasis added.)[7]

Golden State argues that the City has to show a specific Congressional intent to repeal the remedy provided by Section 1983. Such an intent was found by this Court in *Middlesex City Sewerage Authority v. Nat. Sea Clammers*,

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[7] § 141. Short Title; Congressional declaration of purpose and policy.

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any rights in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers *in their relations* affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. (Emphasis added.)

453 U.S. 1 (1981). But this rule only comes into play when there has been a violation of the statute in question. *Middlesex,* 453 U.S. at p. 19.

In *Pennhurst State School and Hosp. v. Halderman,* 451 U.S. 1 (1981), this Court ruled that the plaintiffs were not entitled to a remedy under Section 1983 since the language of the applicable statute was directory and not mandatory and, consequently, the statute conferred no substantive rights. 451 U.S. at pp. 20, 21. The relevant language of Section 8(d) does not secure any substantive right other than an exemption from the charge of an unfair labor practice.[8]

Golden State calls for a "test" to determine when a Section 1983 remedy will be available in a preemption case. But, as Golden State itself has argued, every Section 1983 case is a preemption case insofar as it is the Supremacy Clause which gives the federal constitution and laws priority when they came in conflict with state and local law. Such being the case there is not now suddenly a need for a "test" as called for by Golden State, in preemption cases, to determine if there has been a statutory violation by a local entity.

The Federal Court of Appeals, in *Edwards v. District of Columbia,* 821 F.2d 651 (D.C. Cir. 1987), ruled that the United States Housing Act, in setting forth conditions for approval of applications for demolition of federally funded housing projects, did not secure public housing tenants' rights under Section 1983. In so doing, the court stated that it "read *Wright v. Roanoke Development & Housing Authority* and *Pennhurst* together as standing for the proposition that Congress," in order to create rights

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[8]Since there was no statutory violation by the City, Golden State has failed to clear the first hurdle presented by the *Thiboutot-Pennhurst-Sea Clammers'* line of cases.

enforceable under Section 1983, "must employ 'sufficiently specific and definite' statutory language in order to create rights and, at the same time, give notice to the relevant government unit of its obligations in reference to such rights." P. 657. Justice Stevens and Blackmun, in their concurrence and dissent in *Middlesex,* 453 U.S. at p. 23-24, talked in terms of a violation of a statute, so as to allow for a Section 1983 remedy, being the disregard of the command of a statute. Section 8(d) certainly does not meet these requirements for the purpose of Section 1983 liability in this case.

III.

GOLDEN STATE WAS NOT DENIED ANY RIGHT ENTITLING IT TO COMPENSATORY DAMAGES

Golden State had been operating taxicabs pursuant to a franchise which expired by its own terms on March 31, 1981. Ordinance No. 146,496, as amended by Ordinance No. 154,173, Section 2.2 (App. J.A. 92, 113). The franchise did not provide for any automatic renewal. Section 3(8)(d) of the Los Angeles City Charter states that "the City may, by ordinance, five (5) years or less prior to the expiration of any franchise, grant to the holder of such franchise a new franchise to replace the franchise about to expire. . . .(J.A. 145.) The Federal Court of Appeals, in a decision in this case, ruled that "(t)he wording of the statute (Charter, Section 3(8)(d)) is permissive, not mandatory, thus conferring on the City discretion to deny franchises to applicants even if they meet any established eligibility requirements." *Golden State Transit Corp. v. City of Los Angeles,* 686 F.2d 758, 760 (1982), cert. denied 459 U.S. 1105 (1983).

This Court in *Buck v. Kuykendall,* 267 U.S. 307, 314 (1924) declared that one does not have the right to make the highways his place of business by using them as a

common carrier for hire. Such use is a privilege which may be granted or withheld by the state in its discretion, without violating either the due process clause or the equal protection clause.

Golden State states that the City's issuance of the cease and desist order in 1983 after the preliminary injunction was overturned forced its taxicabs off the street and the company into liquidation. Golden State's Brief, p. 36, fn. 37. But it was the franchise which gave Golden State the right to operate and, as stated, it expired March 31, 1981. Golden State was only able to continue to operate pursuant to the injunction issued by the District Court which had been overturned.[9] Golden State would give the impression that the City should have allowed it to continue to operate even though it no longer had a franchise.[10] Golden State would cast the City as a tortfeasor. Yet the record clearly shows that there were legitimate transportation concerns presented to the City Council to justify its non-renewal. There was evidence that with the non-operation of Golden State there was no shortage of taxicabs and drivers were able, for the first time, to make a minimum decent living. The California Legislature by Section 1983 findings to Government

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[9]Golden State argues that a municipality, intent upon forestalling a strike, may cause public inconvenience, from establishing such a short deadline for settlement that injunctive relief would be effectively foreclosed. That argument would overlook the fact that courts do have the power to grant ex parte temporary restraining orders.

[10]In its Petition for Certiorari (p. 3), Golden State had claimed that the issuance of the cease and desist order on April 29, 1983, had destroyed its business. Yet on December 4, 1985, counsel for Golden State, at time of oral argument in *Golden State*, stated, in response to the question of mootness, that the company was ready to resume operations even though it was in Chapter 11 operations. By that date Golden State had already converted the proceeding into a Chapter 7 liquidation, having done so March 7, 1985.

Code, Section 53075.5, (App. 1) declared that the privately operated taxicab transportation service is ... a matter of statewide concern."

Golden State makes reference to the statements by three members of the City Council. What motivates one legislator, however, to make a speech in reference to a proposed action is not necessarily what motivates others to take an action. Eleven councilmembers voted against the renewal. Consequently, courts will not, except in a very limited and well-defined class of cases, inquire into legislative motives. *United States v. O'Brien*, 391 U.S. 367, 383-384 (1968). But, Golden State emphasizes the statements of the Teamsters and the AFL-CIO representatives. Merely because the Teamsters were urging a nonrenewal in order to put pressure on Golden State does not allow for the conclusion that that was the rationale for action of the City Council.[11] The representative of the Teamsters was certainly entitled, as any citizen, to petition an elective body to support its particular point of view.[12]

Golden State argues that the failure to award damages here would permit city governments to manipulate the bargaining conduct of employers and employees. There is no evidence, however, that this is occurring. There does not appear to be any cases evidencing such attempts by governmental entities.

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[11]Golden State states that the Council's action of February 11, 1981, and February 17, 1981, were at the urging of the Teamsters. But, again, the City Councilmembers' motives for such actions, whatever they may have been, are not relevant.

[12]Golden State's characterization of what happened in this case necessitated this discussion by the City of the record, if only, to use the phrase "set the record straight".

For reasons stated, the City's alleged action which was deemed preempted did not deprive Golden State of any right within the meaning of Section 1983. Furthermore, if Golden State suffered any damages it was not the proximate result of the alleged action of the City ruled preempted. Rather the proximate cause of any damages was the non-renewal of the franchise. But this Court specifically stated that its holding in *Golden State* did not require the City to renew any particular franchise. The City was not preempted from not renewing the franchise. The Question Presented, therefore, is not dispositive of the legal ramifications of the facts in this case. Accordingly, it would be appropriate for the Court to dismiss the petition as improvidently granted.

CONCLUSION

For the reasons set forth above, the City of Los Angeles respectfully submits that the decision below should be affirmed, or, in the alternative, the petition for writ of certiorari be dismissed as improvidently granted.

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APPENDIX A

California Government Code § 53075.5

§ 53075.5. Taxicab transportation service; local ordinances' requirements

(a) Notwithstanding Chapter 8 (commencing with Section 5351) of Division 2 of the Public Utilities Code, every city or county shall protect the public health, safety, and welfare by adopting an ordinance or resolution in regard to taxicab transportation service rendered in vehicles designed for carrying not more than eight persons, excluding the driver, which is operated within the jurisdiction of the city or county.

(b) Each city or county shall provide for, but is not limited to providing for, the following:

(1) A policy for entry into the business of providing taxicab transportation service.

(2) The establishment or registration of rates for the provision of taxicab transportation service.

(c) Each city or county may levy service charges, fees, or assessments in an amount sufficient to pay for the costs of carrying out an ordinance or resolution adopted in regard to taxicab transportation services pursuant to this section.

(Formerly § 53075, added by Stats.1983, c. 1260, § 2. Renumbered § 5307.5 and amended by Stats.1986, c. 248, § 87.)

Historical Note

1983 Legislation.

Section 1 of Stats.1983, c. 1260, provided:

"The Legislature finds and declares the following:

"(a) The orderly regulation of vehicular traffic on the streets and highways of California is essential to the welfare of the state and its people.

"(b) Privately operated taxicab transportation service provides vital transportation links within the state and between the state and the people and economic systems of the nation and the world. Taxicab transportation service operated in the cities and counties enables the state to provide the benefits of privately operated, demand-responsive transportation services to its people and to persons who travel to California for business or tourist purposes.

"(c) The economic viability and stability of privately operated taxicab transportation service is, consequently, a matter of statewide importance.

"(d) The policy of this state is to promote safe and reliable privately operated taxicab transportation service in order to provide the benefits of that service. In furtherance of this policy, the Legislature recognizes and affirms that the regulation of privately operated taxicab transportation service is an essential governmental function."

APPENDIX B

Los Angeles City Charter Sec. 281

Sec. 281. No ordiance, legislative, administrative or executive, passed by the Council shall go into effect until the expiration of thirty days from its publication, except an ordinance ordering, or otherwise relating to an election or to the levying or collection of the annual city taxes; an ordinance establishing or changing the name of, or curb lines of, or respecting the establishment or change of grade of, or the improvement in any manner of, or the opening, widening, straightening or extension of, streets, boulevards, alleys, courts or other public places, and an ordinance respecting the construction of sewers or storm drains, or respecting the bringing or conduct of suits or actions or the levying or collection of local assessments upon private property for any of said purposes, or respecting the condemnation of lands for parks, boulevards or playgrounds under laws or ordinances providing for the payment of the expense thereof by local assessments upon private property, or any ordinance authorized or required by the laws of this state, or by or under the provisions of this charter, respecting the improvement of streets or other public places; and an ordinance required for the immediate preservation of the public peace, health or safety, which shall contain a specific statement showing its urgency, and is passed by a three-fourths vote of the Council; but all ordinances of any of the classes heretofore excepted by this section shall take effect upon their publication. No grant of any franchise, right or privilege shall ever be construed to be an urgency measure, but all grants of franchises, rights or privileges shall be subject to a referendary vote hereinafter provided. No ordinance, order or resolution passed by the Council making or authorizing any contract shall go into effect until the expiration of thirty days from the publication of such

ordinance, or the adoption of such order or resolution, except contracts for street or other public improvements, the cost and expenses whereof are to be paid by local assessments, contracts requiring payment from funds under the control of the Water and Power, or Harbor Departments and contracts that required the payment by the city of less than twenty-five thousand dollars, and except any ordinance, order or resolution of the Council authorizing the sale or issuance of bonds of the city or of any district therein. Except as hereinbefore provided, orders and resolutions shall take effect upon their passage (Amended, 1931.)

APPENDIX C

Los Angeles Municipal Code

Sec. 71.02. Operation of Vehicles — Permits or Franchises Required:

(a) No person shall operate or use, whether as owner, lessor, lessee or otherwise, any of the vehicles defined in Section 71.00, or allow or permit to be operated or used, whether as owner, lessor, lessee, or otherwise, any of the vehicles defined in Section 71.00 unless a written vehicle permit for the operation of such specifically defined vehicles has been obtained from the board; provided, however, that no vehicle permit shall be required for the operation of any vehicle under and in accordance with the terms and conditions of a franchise granted by the City of Los Angeles. (Amended by Ord. No. 149,526, Eff. 5/21/77.)

(b) (Amended by Ord. No. 160,553, Eff. 1/9.86.) No person shall operate taxicabs without a franchise granted by the City of Los Angeles, except that the Board may:

1. Grant to an individual a non-transferable Vehicle Permit to operate a single taxicab subject to the permittee being a member of, and operating as a part of an association, whether incorporated or not, and subject to said association having been granted a nonexclusive, revocable, Operating Permit by the Board, with such Operating Permit subject to approval of the City Council, to provide taxicab service in the City of Los Angeles under terms and conditions as established by the Board, or

2. Grant to a cooperative a specific number of nontransferable taxicab Vehicle Permits subject to such cooperative having been granted a nonexclusive, revocable, Operating Permit by the Board, with such Operating Permit subject to approval of the City Council, to provide taxicab service in the City of

Los Angeles and subject to said cooperative having ownership and control of all vehicles, the number of shares being equal to the number of Vehicle Permits held by the cooperative, the cooperative hiring and maintaining professional management and all operations being conducted pursuant to the terms and conditions of the Operating Permit. No individual (the term "individual" shall include immediate family, specifically spouse, parent, grandparent, child, grandchild, sister, brother, sister-in-law, brother-in-law, aunt or uncle) shall own more than five shares and in no event shall any person have more than a 5% interest in the cooperative.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On May 25, 1989, I served the within Respondent Brief in re: "Golden State Transit Corp. v. City of Los Angeles," in the United States Supreme Court, October Term 1988 No. 88-840, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 25, 1989, at Los Angeles, California.

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CE CE MEDINA

REPLY

BRIEF

Supreme Court, U.S.
FILED
JUN 24 1989
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No. 88-840

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

GOLDEN STATE TRANSIT CORPORATION,
Petitioner,

v.

CITY OF LOS ANGELES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I. THE QUESTION BEFORE THE COURT HAS BEEN ADDRESSED FULLY BY THE PARTIES.

The question before the Court is easily understood: whether Section 1983 relief is available in a preemption case where Congress, in a federal statute, has implicitly rather than expressly protected specific private conduct against government sanction. By holding that Section 1983 relief is unavailable in preemption cases unless Congress expressly preserves federally protected rights from state or local government negation, the Ninth Circuit has created an unprecedented and inappropriate test, applicable only to preemption cases. As we have argued, *see* Golden State brief, at 24-25, the appropriate initial inquiry under Section 1983 is whether Congress has created "rights, privileges, or immunities"; if such enforceable

entitlements have been denied, it should not matter that the state or local government technically has violated the Supremacy Clause as opposed to the underlying statute. Neither should it matter that the congressional protection is implied rather than express. In determining whether Congress intended to create "rights, privileges, or immunities" enforceable under Section 1983, the Court traditionally has looked not only to statutory language, but to "the legislative history of the statute and other traditional aids of statutory interpretation." *Wright v. City of Roanoke Redev. and Hous. Auth.*, 479 U.S. 418, 433 (1987) (O'Connor, J., dissenting). The Ninth Circuit's "direct violation" test imposes an artificial and inappropriate barrier to ascertaining legislative intent. Nowhere is that impropriety more clearly revealed than in this case, in which the Court already has determined that Congress intended to protect management and labor from state and local government interference with the bargaining process, and where an award of compensatory damages is essential to preserve the proper operation of the federal labor laws. *See* Golden State brief, at 37-40.

The City and its amici criticize the alleged lack of clarity in the Court's phrasing of the question, claiming that the issue framed by the Court has not been addressed by the parties. *See* City brief, at 15; National League of Cities brief, at 7-8. While we too have some difficulty with the term "direct violation", *see* Golden State brief, at 25, the Court's question raises the very issue argued to and resolved improperly by the court below. Moreover, the propriety of the Ninth Circuit's "direct violation" test, and the availability of Section 1983 relief in this case, has been fully briefed by the parties and amici and is appropriate for resolution by this Court. We devoted a substantial portion of our initial brief to illustrating that the Ninth Circuit's "direct violation" test does not comport with the accepted judicial construction of Section 1983, and that the Ninth Circuit's application of its test in this case results in negation of the Court's prior

ruling and perversion of the regime of free collective bargaining created by Congress. *See* Golden State brief, at 18-28, 37-40. By contrast, the City has argued that the express language of the National Labor Relations Act does not prohibit state or local government interference with the collective bargaining process, thus adopting the Ninth Circuit's analysis.

In these circumstances, we find mysterious the suggestion that the writ should be dismissed as improvidently granted because the parties have not addressed whether the National Labor Relations Act ("NLRA") creates rights enforceable under Section 1983.[1] We devoted nearly one-third of the argument portion of our brief to this very issue, illustrating precisely why Golden State's NLRA rights fall within traditional Section 1983 standards. The City did not argue the issue in this fashion, contenting itself with claims about the plain language of the NLRA that should be foreclosed in light of the Court's ruling in *Golden State*. *See infra*, at 10-11. That the City did not attempt to argue the case under traditional Section 1983 standards, however, does not mean the writ was improvidently granted; it means, instead, that the City believed it would not prevail if the inquiry were to turn on congressional intent. This is hardly a surprising

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[1] The Court never dismisses a writ without good reason, and repeatedly has stated that "[o]ur decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985); *accord City of Canton v. Harris*, —— U.S. ——, 57 U.S.L.W. 4270 (Feb. 28, 1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915 (1988). This should be true particularly where the decision being reviewed contradicts a prior ruling by the Court, and threatens the integrity of the federal statutory scheme deliberately preserved by the Court from state and local government interference. It is extraordinarily telling that the City and its amici never controvert our argument that a failure to grant complete relief to Golden State will fundamentally deform the collective bargaining process. *See* Golden State brief, at 37-40.

conclusion given the City's admission that in *Golden State*, the Court held that the City's conduct "contravened congressional intent, as demonstrated by the language of the National Labor Relations Act . . . and its legislative history." City brief, at 9. The issues in this case are appropriately joined and should be decided, even if only Golden State has addressed the issue that should be dispositive: whether the NLRA's ban on state or local government coercion in collective bargaining created "rights, privileges, or immunities" enforceable under Section 1983.[2]

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[2] Because the issue before the Court is purely one of law, the City's myriad factual arguments, along with its final claim that the writ should be dismissed because the City did not act as a tortfeasor (City brief, at 21-24), simply do not address the pending question. We would note, as we did in our original brief, at 8 n.6, that the City introduced no new evidence in the summary judgment proceedings in the district court, and thus there are no significant factual disputes that might make the Court's resolution of the legal issue unnecessary.

At the risk of unduly extending this reply brief, we would offer two observations about the factual arguments made by the City. First, although the issue is not before the Court, the City's claim that it acted for legitimate transportation related motives has been made to and rejected by every court to have considered this case, and was dealt with specifically and at length by this Court. *See* 475 U.S. 608, 615 & n.6 (1986), Pet. App., at 9a & n.6 ("The District Court found that the Council had conditioned the franchise on a settlement of the labor dispute by March 31. We agree with the Court of Appeals that this finding is amply supported by the record."); *and see* 754 F.2d 830, 833 (9th Cir. 1985), J.A. 160, 167 ("[The City] merely insisted upon resolution of the [labor] dispute as a condition to franchise renewal."); 686 F.2d 758, 759 (9th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983), J.A. 146, 148 ("There is ample evidence in the record to support a finding that by threatening to deny and ultimately denying renewal of Yellow Cab's franchise, the city deprived Yellow Cab of an economic weapon."). The district court that originally considered this case found it "undisputed that the sole basis for refusing to extend plaintiff's franchise was its labor dispute with its Teamster drivers", 520 F. Supp. 191, 193 (C.D. Cal. 1981), J.A. 135, 138, a finding clearly supported by the record. It is far too late in the day for the City to claim with any degree of credibility that it did not in fact condition renewal of Golden State's franchise upon resolution of the labor dispute.

Second, and perhaps more telling, the City raised these self-same motivation issues, *in haec verba*, in a Petition for Rehearing filed in this Court following the decision in *Golden State*. That Petition for Rehearing, arguing that the Court's discussion of the issue was a misconstruction of the record, was rejected as untimely filed. The City's attempt to resurrect the identical factual arguments before the Court in these circumstances cannot be countenanced.

II. GOLDEN STATE'S RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT ARE ENFORCEABLE UNDER SECTION 1983.

There is substantial unanimity between the parties as to the appropriate legal principles governing this case. We and our amicus have argued that not all Supremacy Clause cases are *ipso facto* excluded from the scope of 42 U.S.C. § 1983;[3] the City and its amici have argued that not all preemption cases *ipso facto* sound under 42 U.S.C. § 1983. The parties appear to agree that there is a middle range of preemption cases in which Section 1983 relief may be appropriate.[4]

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[3] Contrary to the suggestion of the City and its amici, we never argued that all Supremacy Clause cases sound under Section 1983. Indeed, we devoted a considerable portion of our brief to formulating an appropriate test for determining which preemption cases should fall under Section 1983. *See generally* Golden State brief, at 17 ("[W]e do not propose that Section 1983 relief is necessarily appropriate in every preemption case.").

Neither did we claim that *Chapman v. Houston Welfare Rights Org.*, 41 U.S. 600 (1979), stood for the proposition that all Supremacy Clause cases must sound under Section 1983. We specifically noted that the Court in *Chapman* held "that the Supremacy Clause, standing alone, did not create substantive rights that could support a cause of action cognizable" under the statutory provisions there at issue. Golden State brief, at 14 n.12.

[4] This also was the conclusion of the Court below. *See* 857 F.2d 631, 636 (9th Cir. 1988), Pet. App., at 26a. For this reason, the debate whether the Supremacy Clause is a "rights conferring" or a "power allocating" provision is irrelevant. The Supremacy Clause does allocate power between governmental levels, but in so doing it

Moreover, three of the briefs before the Court—ours and the two amicus briefs—agree that the appropriate inquiry in resolving this question is whether Congress intended, in a federal statute, to create "rights, privileges, or immunities" enforceable under Section 1983. *See* Golden State brief, at 18-19; American Trucking Association brief, at 14; National League of Cities brief, at 14. The proper criteria for making this determination have been spelled out again and again by this Court, most recently in *Wright v. City of Roanoke*, and there is no substantial disagreement between these three briefs as to the applicable standards.[5]

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makes specific federal protections and prohibitions of private conduct binding on state and local government. It thus has (at least) a dual function, as do many clauses of the Constitution. *See generally* Note, *Section 1983 Remedies for Violation of Supremacy Clause Rights*, 97 Yale L.J. 1827, 1840 (1988). Classifying the Supremacy Clause either as "power allocating" or "rights conferring" is an overstatement that provides no useful guidance for the Court in this case.

[5] Our brief argues, on the basis of *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), and *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1 (1981), that Section 1983 relief is appropriate if Congress has created a mandatory norm rather than an advisory statement, and Congress has not expressly or impliedly precluded Section 1983 relief. The City's amici suggest that the proper test also includes inquiry into whether the plaintiff was within the class of persons for whose especial benefit the statute was enacted (a subject addressed in our initial brief, at 19 n.15, and at 20-21), and that "the statute must establish reasonably specific and judicially manageable standards of conduct." National League of Cities brief, at 5.

We have no serious dispute with this phrasing of the test, insofar as these additional criteria both are subsumed within the analytical framework that we have proposed, and their application would in no way alter the appropriate result in this case. We again would note, however, that the Section 1983 inquiry is not identical to a private right of action analysis, as implied by the City's amici. In our brief, at 19 n.15, we noted that under Section 1983 there is a presumption that Congress intended to authorize citizens to enforce their claims against state and local governments in the federal

There also is substantial agreement that the Ninth Circuit's unprecedented "direct violation" test does not comport with established Section 1983 standards. Both the City and its amici, by criticizing the Court's use of the term "direct violation" in the formulation of the question, tacitly admit that a test based upon such a term is not useful.[6] Neither of the opposing briefs, however, explains how the Ninth Circuit's "direct violation" test can be squared with existing Section 1983 doctrine, an inconsistency that troubled Judge Alarcon below, *see* 857 F.2d, at 637, Pet. App., at 29a-30a (specifically discussing the incompatibility between Ninth Circuit test and the principles set forth in *Wright*), and was discussed at length in our original brief, at 25-28. It may well be, as argued by the City's amici, that Section 1983 standards established by the Court generally are well understood and properly applied by the circuit courts, including panels within the Ninth Circuit. This general level of understanding, assuming it exists, certainly did not extend to the decision below. It is the error of that decision, the substantial danger posed if a "direct violation"

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courts. *See also* Golden State brief, at 11-13, and cases there cited. Given this presumption, the appropriate inquiry under Section 1983 is preclusion, and the burden is placed upon the state or local government to demonstrate deliberate congressional foreclosure of Section 1983 relief. By contrast, there is no presumption that Congress intended to allow private citizens the right to settle their disputes *inter se* in the federal courts. In such cases, the burden is placed upon the proponent of the private cause of action to establish that Congress, by enacting a federal regulatory statute, impliedly intended to allow him to sue another private party in federal court. *See also Victorian v. Miller*, 813 F.2d 718 (5th Cir. 1987) (noting distinction between Section 1983 and private right of action inquiries); *Samuels v. District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985).

[6] Indeed, the City's amici go so far as to state that this case plainly involves a "direct violation" of the National Labor Relations Act, *see* National League of Cities brief, at 7, a conclusion with which the City evidently disagrees.

test is adopted by other circuits as the appropriate criterion in preemption cases, and the disruption of the federal labor laws likely to ensue absent a full remedy for parties in Golden State's position, that must be corrected by the Court. It is no answer to say that other courts in other cases have better understood the law.

Application of traditional Section 1983 standards leaves no doubt as to the appropriate result in this case. The Court's *Golden State* holding establishes that Congress protected specific private conduct—collective bargaining—from government sanction; even the City admits that conditioning renewal of a franchise upon immediate resolution of a labor dispute "contravened congressional intent, as demonstrated by the language of the National Labor Relations Act . . . and its legislative history." City brief, at 9. This ban is mandatory, not precatory or advisory; its enforcement through a traditional damage remedy raises no delicate balancing of conflicting interests, and is well within the institutional competence of the federal judiciary; and Golden State, as an employer, is plainly one of the parties "especially benefitted" by the legislation.[7] Moreover, effective enforcement of that ban,

[7] The suggestions to the contrary imply that the National Labor Relations Act had no "especial beneficiaries" and that the statute was passed solely to benefit the general public. This reasoning not only is belied by the language of Section 1(b) of the Taft-Hartley Act, 29 U.S.C. § 141(b), which states that the law is designed "to prescribe the legitimate rights of both employees and employers," but by common sense. Congress created the collective bargaining process not merely to benefit the public, but to endow management and labor with the power to create and modify their own understandings of how to order the workplace. This is not an abstract right of equal interest to all citizens, as were the environmental interests considered by the Court in cases such as *California v. Sierra Club*, 451 U.S. 287 (1981). Golden State is not acting as a private attorney general in asserting its rights against the City. Rather, Golden State is acting as a private citizen endowed by Congress with the right to participate meaningfully in deciding how its business was to be run during the term of the next labor agreement. To say that an employer in these circumstances is merely seeking to enforce legal standards equally applicable to all citizens, rather than as a private citizen attempting to preserve rights granted to him by Congress, is to indulge in willful myopia.

through complete relief for parties like Golden State, is absolutely necessary for proper operation of the system of labor-management relations created by Congress, *see* Golden State brief, at 37-40, an argument that, as noted above, has received no comment from the City or its amici.

III. THE CITY'S CONDUCT VIOLATED THE NATIONAL LABOR RELATIONS ACT.

This case can be decided without determining whether the City "violated" the National Labor Relations Act. In this, as in any other Section 1983 case, the central inquiry is whether Congress created "rights, privileges, or immunities" enforceable under Section 1983. If this is so, whether Congress also intended to make deprivation of such entitlements a separate statutory violation is not necessarily determinative.[8] As we have established above, application of accepted Section 1983 standards establishes that management and labor are entitled to a complete remedy under Section 1983, including an award of compensatory damages if otherwise appropriate, when they are punished for their stance in collective bargaining.

[8] Of course, this inquiry would become important if there was evidence that Congress desired to create an exclusive statutory remedy for deprivation of such entitlements. There is absolutely no such evidence in this case, as we previously have established. *See* Golden State brief, at 21-23. The argument made by the City and its amici, that the absence of a statutory remedy implies that Congress intended to create no enforceable rights, is a classic example of backward reasoning. Section 1983 has been applied to statutory claims precisely and only in those cases where Congress has created no statutory remedy that would preclude judicial enforcement. If the absence of a statutory remedy foreclosed the possibility that Congress had created enforceable entitlements, there never would be any occasion where Section 1983 properly could be applied to statutory claims.

Nonetheless, in this case the City's conduct plainly did violate the National Labor Relations Act. The City's contrary claim, like the conclusions of the courts below, necessarily rests upon the premise that the National Labor Relations Act imposes no enforceable obligations upon state or local government,[9] a premise completely antithetical to the Court's ruling in *Golden State*. In *Golden State*, the Court held that the NLRA does impose enforceable obligations upon state and local governments, concluding that "[T]he language of the NLRA and its legislative history . . ." established that "[t]he settlement condition imposed by the Los Angeles City Council . . .

[9] The City claims, in its discussion of Section 8(d) of the Act, that "[t]he language of that particular provision does not secure any right, privilege or immunity of an employer or employee *against state or local regulation*." City brief, at 16 (emphasis added). The Ninth Circuit stated that the National Labor Relations Act "impose[s] obligations on 'an employer' and on a 'labor organization'. Actions of a third party, not employer or employee labor organization, do not give rise to a claim for damages against the third party . . . ." 857 F.2d, at 635, Pet. App., at 24a. *And see* J.A. 216 (District Court conclusion that "Section 8(d) . . . does not create rights and obligations with respect to third parties who are not parties to a collective bargaining agreement . . . .").

It never has been clear, if these theories are correct, why the entry of injunctive relief against the City—which the courts below were willing to approve, based in part upon the City's stipulation that such relief was proper—would be appropriate. If the NLRA imposes no obligations upon entities other than the parties to bargaining, there logically would be no warrant for entry of any relief against the City, injunctive or otherwise. The willingness of the courts below to award injunctive relief, and the City's willingness to stipulate to its entry, can only be understood as an obligatory nod to the Court's decision in *Golden State*. We submit that the Court's prior decision must be followed in its entirety, however, rather than treated as an inconvenient impediment to reaching what the lower courts believe is a "fair" result. *See Will v. Michigan Dep't of State Police*, —— U.S. ——, 57 U.S.L.W. 4677, 4680 n.10 (June 15, 1989) (re-emphasizing that there is no basis for bifurcated application of Section 1983 to municipalities depending on the nature of the relief sought against them) (citing *City of Kenosha v. Bruno*, 412 U.S. 507, 513 (1973)).

destroyed the balance of power designed by Congress, and frustrated Congress' decision to leave open the use of economic weapons." 475 U.S., at 616, 619, Pet. App., at 9a, 13a. A contrary conclusion, based upon reading the literal language of the NLRA in isolation from the Court's binding interpretation of that language in light of the legislative history of the statute, was simply beyond the authority of the lower courts, for reasons previously discussed at length. *See* Golden State brief, at 25-28.

Indeed, the City's argument is directly contrary to the specific holding of *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employ. Rel. Comm'n*, 427 U.S. 132 (1976), the seminal opinion upon which all of the Court's "second branch" labor preemption jurisprudence is based. In *Machinists*, the Court very carefully traced the history of congressional efforts to preclude governmental interference in the collective bargaining process, recapitulating the Court's prior holdings and once again examining carefully the legislative history of the statute.[10] On the basis of this exhaustive analysis, the Court specifically held that Section 8(d)'s statutory ban against National Labor Relations Board ("NLRB") interference with collective bargaining applied equally to state and local governments:

> Our decisions hold that Congress meant that these activities, whether of employer or employees, were not to be regulable by States any more than by the NLRB . . . .
>
> . . . .
>
> . . . [S]tate attempts to influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB . . . .

[10] The relevant cases and legislative history are discussed in our brief in this case, at 26-28, and at even greater length in our merits brief in the first Golden State case. *See* Brief of Petitioner in No. 84-1644, at 11-25, and materials there cited.

427 U.S., at 149, 153. This very holding formed the basis for the decision in *Golden State*. *See* 475 U.S., at 618-19, Pet. App., at 12a-13a.

The City's claim that Section 8(d) merely prevents the NLRB from holding bargaining conduct violative of the Act (City brief, at 16, 20) makes no sense in light of *Machinists*. State and local governments have no power to adjudicate unfair labor practices under the NLRA. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Congress thus could not have intended to transpose a mere adjudicatory ban on federal agency activity to state and local governments. Rather, as the Court made clear both in *Machinists* and in *Golden State*, the Act's prohibition on government interference with the bargaining process is of much broader scope, precluding all state and local government efforts to force the parties into an agreement. The very premise of the statute, from the passage of the Wagner Act to the present day, is freedom of contract; Congress deliberately allowed private parties freely to determine the shape and content of their bargain. That is precisely what the Court meant when it stated: "'Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA.' *New York Tel. Co. v. New York Labor Dep't*, 440 U.S. [519], 551 [(1979)] (POWELL, J., dissenting). Even though agreement is sometimes impossible, government may not step in and become a party to the negotiations." 475 U.S., at 619, Pet. App., at 12a (further citations omitted). The NLRA already has been construed by the Court in a fashion directly contrary to the narrowly cabined literal approach suggested by the City and adopted by the courts below.

The literalism advocated by the City not only contradicts the Court's ruling, but would render management and labor helpless when confronted with government pressure at the bargaining table. State and local governments

would be free to coerce management and labor as they saw fit, secure in the knowledge that the only penalty that might be imposed—and this only after an employer or union expends substantial and unrecoverable legal fees in a court battle—is an injunction that does not affect the government's fisc. The Court repeatedly has observed in Section 1983 cases that an award of damages is necessary both to compensate individuals for the violation of federal rights and to deter future abuses of power. *See, e.g., Owen v. City of Independence*, 445 U.S. 622, 651-52 (1980) ("A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees . . . ."). Those observations are fully applicable here.

There is no record support for the City's suggestion that normal principles of municipal liability should not be applied here because state or local government coercion in the bargaining process does not occur frequently. We would note, without asking the Court to take judicial notice of details of the many politically important labor disputes in which state or local government officials have been involved, that state and local governments commonly do attempt to mediate disputes where a strike or lockout could cause public inconvenience. Indeed, the City's unsuccessful mediation efforts in this very case led directly to the City's unlawful coercion. If state and local government officials do not face the possibility of serious penalty should their mediation efforts turn coercive, even the best intentioned legislator is bound to yield to local political pressures and attempt to enforce his or her own version of the "public good." The potential for disruption of the regime of free collective bargaining is enormous. A complete remedy for injured parties, including an award of compensatory damages, is the only way to ensure that local governments confine themselves to moral suasion and avoid unlawful coercion.

In final answer to the City's claim that its conduct did not violate the NLRA, we would ask where the "congressional intent" resides that the City admits would be

violated by conditioning franchise renewal upon resolution of the labor dispute. City brief, at 9. Congressional intent is not a brooding omnipresence, free from statutory anchor. The NLRA does not have penumbras or emanations, legal specters floating free in the jurisprudential void. Congressional intent underlying the NLRA resides in the statute itself, nowhere else. The City's implication that there is a decisional difference between a statute's language and the legislative will underlying that language contradicts the Court's established jurisprudence, fully applied in Section 1983 cases, under which "the legislative history of the statute and other traditional aids of statutory interpretation," *Wright*, 479 U.S., at 433 (O'Connor, J., dissenting), are used to decide what Congress intended in passing the statute.[11] Once the statute has been interpreted for liability purposes—as the NLRA

[11] The statutory issues involved in determining whether the City is subject to a damage remedy are fundamentally different from questions of a state's Eleventh Amendment sovereign immunity. In the latter context, because "abrogation of sovereign immunity upsets the 'fundamental constitutional balance between the Federal Government and the States,'" the Court has stressed that "Congress may abrogate the State's constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Dellmuth v. Muth*, —— U.S. ——, 57 U.S.L.W. 4720, 4721-22 (June 15, 1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 242 (1985)). As we have noted, however, Golden State brief, at 11 n.8, the Court has made it equally clear that municipalities enjoy no Eleventh Amendment protection and therefore are subject to damage suits under Section 1983. *See, e.g., Will v. Michigan Dep't of State Police*, —— U.S. ——, 57 U.S.L.W. 4677, 4679 n.7 (June 15, 1989) (citing *Monell v. New York Dep't of Social Servs.*, 436 U.S. 658 (1978)); *Owen v. City of Independence*, 445 U.S. 622 (1980) (emphasizing that municipalities, unlike states, do not enjoy sovereign immunity). The constitutional concerns underlying the *Atascadero* line of cases are not present here, and the narrow focus on statutory language found in those cases has no applicability to the issues before the Court.

plainly was in *Golden State*—there is no occasion to reexamine legislative intent and statutory language for remedial purposes. The claimed distinction between statutory language and "legislative intent" is nothing more than thinly veiled reargument of the original question of statutory interpretation. Such reargument should not be allowed.

CONCLUSION

For the reasons stated above and in our initial brief, Golden State respectfully submits that the decision below be reversed, and this case remanded for determination of damages under 42 U.S.C. § 1983.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1988

GOLDEN STATE TRANSIT CORP., PETITIONER

v.

CITY OF LOS ANGELES, RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an allegation that municipal conduct is preempted by a federal statute is cognizable under 42 U.S.C. § 1983 absent a "direct violation" of the federal statute.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

American Trucking Associations, Inc. (ATA) is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Congress has subjected the trucking industry to extensive federal regulation and has thereby preempted state and local efforts to regulate in a variety of areas. See, *e.g.*, 15 U.S.C. § 1392(d) (1989 Supp.); 49 U.S.C. § 1811; 49 U.S.C. §§ 10101, 11503a, 11504, 11506; 49 U.S.C. App. §§ 2322, 2316. ATA and its members have frequently instituted litigation to vindicate these rights to be free of state and local regulation. See *New York State Motor Truck Ass'n* v. *City of New York*, 654 F. Supp. 1521,

1535 (S.D.N.Y. 1987), aff'd per curiam, 833 F.2d 430 (2d Cir. 1987); *Evans* v. *Burnley*, 695 F. Supp. 365 (M.D. Tenn. 1988); *National Tank Truck Carriers* v. *Burke*, 535 F. Supp. 509 (D.R.I. 1982), aff'd, 698 F.2d 559 (1st Cir. 1983). They accordingly have a substantial interest in ensuring that the remedy set forth in 42 U.S.C. § 1983 extends to violations of these rights conferred by Congress.

Moreover, ATA and its members also have frequently invoked 42 U.S.C. § 1983 in litigation challenging state action that deprives them of their right under the Commerce Clause to engage in interstate commerce free of unreasonable burdens and unlawful discrimination. See, *e.g.*, *American Trucking Associations, Inc.* v. *Scheiner*, 107 S. Ct. 2829 (1987); *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *A.B.F. Freight System, Inc.* v. *Suthard*, 681 F. Supp. 334 (E.D.Va. 1988); *American Trucking Associations, Inc.* v. *Quinn*, 437 A.2d 623 (Me. 1981). Several lower courts have held Section 1983 inapplicable to Commerce Clause claims for reasons similar to those relied upon by the court below in concluding that the statute does not encompass preemption claims. See *Private Truck Council of America, Inc.* v. *Quinn*, 476 U.S. 1129 (1986) (White, J., dissenting). To the extent that this Court's analysis and disposition of the issue presented here is relevant to the availability of Section 1983 to redress violations of the Commerce Clause, ATA and its members have an additional interest in this case.[1]

STATEMENT

This case arose out of a labor dispute between Golden State Transit Corporation (Golden State), which operated taxicabs in the City of Los Angeles, and the International Brotherhood of Teamsters, representing its drivers. The

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 36.

drivers went on strike in February 1981, just at the time that the Los Angeles City Council was considering the renewal of Golden State's operating franchise. Although the Los Angeles Board of Transportation Commissioners recommended that Golden State's operating franchise be renewed, and although the City Council Transportation and Traffic Committee found that Golden State was "in compliance with all terms and conditions of [its] franchise," the City refused to renew the franchise unless the strike was settled. Golden State then commenced this action under 42 U.S.C. § 1983, alleging that the City's conduct violated its rights under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq.* The court of appeals rejected Golden State's claim on the merits, holding that the NLRA did not bar the City from declining to renew the franchise because of the pendency of the strike.

This Court reversed. *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986) (*Golden State I*) (reprinted at Pet. App. 1a-17a). The Court held that Los Angeles had violated the NLRA by interfering with Golden State's use of legitimate self-help under the federal labor laws—*i.e.*, by "condition[ing] the renewal of Golden State's franchise on the company's reaching a labor agreement with the" union. 475 U.S. at 619. The Court stated that "Congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance ' "between the uncontrolled power of management and labor to further their respective interests." ' States are therefore prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts, unless such restrictions presumably were contemplated by Congress." *Id.* at 614-615 (citations omitted).

Because "[t]he parties' resort to economic pressure was a legitimate part of their collective-bargaining process," the Court held that " 'federal law intended to leave

the employer and the union free to use their economic weapons against one another.'" *Golden State I*, 475 U.S. at 615, 618 (citation omitted). "The settlement condition imposed by the Los Angeles City Council," by contrast, "destroyed the balance of power designed by Congress, and frustrated Congress' decision to leave open the use of economic weapons." *Id.* at 619. Accordingly, the Court concluded that the City was prohibited from interfering with this federal scheme by refusing to grant Golden State a franchise renewal unless it agreed to settle the labor dispute. *Ibid.* The Court remanded the case "for further proceedings consistent with this opinion." *Id.* at 620.

The principal issue on remand was the relief to be afforded to Golden State.[2] The district court ordered the City to grant a franchise to Golden State and awarded "ancillary monetary relief sufficient to 'salvage' Golden State" (Pet. App. 22a). This "ancillary monetary relief" was to be measured by "the fair market value of Golden State's assets as of the date of the City's action, less any sum Golden State received pursuant to bankruptcy proceedings" (*ibid.*). The court rejected Golden State's claim for compensatory damages, however, holding that neither 42 U.S.C. § 1983 nor the Supremacy Clause supplied a cause of action for damages.

The court of appeals affirmed the denial of compensatory damages. Pet. App. 18a-31a. The court first concluded that "no * * * right, privilege or immunity secured by the NLRA was 'violated' by the City in this instance" (*id.* at 24a). Asserting that Section 1983 " 'enforces federal statutory rights only against direct violations of the federal statute in question,' " the court determined that Golden State could not invoke that provision because the NLRA contains no express restriction on the City's au-

[2] While the case worked its way through the courts, Golden State had been forced into an involuntary bankruptcy proceeding that culminated in the liquidation of the company. 475 U.S. at 613 n.3.

thority to interfere in collective bargaining (*ibid.* (citation omitted)).[3] The court further stated that, even if the City had violated a right conferred by the NLRA, Congress intended to limit relief for violations of the Act to those remedies specified in the statute. *Id.* at 25a-26a.

The court of appeals also rejected Golden State's claim that it was entitled to damages under Section 1983 on the theory that the City had violated rights secured by the Supremacy Clause. The court held that "the Supremacy Clause 'is not a rights conferring provision that protects the individual against government intrusion' " and that " 'preemption of state law under the Supremacy Clause—at least if based on federal occupation of the field or conflict with federal goals—will not support an action under section 1983' " (Pet. App. 26a (citation omitted)).

SUMMARY OF ARGUMENT

A. Section 1983 of Title 42 of the United States Code provides a cause of action for equitable relief and damages to "[e]very person" who, under color of state law, is deprived of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. The lower courts that have considered whether preemption claims may be brought under Section 1983 have analyzed the issue as if the Supremacy Clause were the source of the rights that such claims seek to vindicate. The decisions of these courts accordingly have turned on

[3] Judge Alarcon disagreed. In his view, Section 1983 is not limited to rights spelled out in express provisions of a federal statute, but extends to all rights conferred by federal law. "In the case *sub judice*, the City of Los Angeles deprived Golden State of the statutory right to engage in the collective bargaining process free from third-party interference. Thus, under *Wright* [v. *City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987)], Golden State would appear to have a cause of action for damages under section 1983" (Pet. App. 30a (citations omitted)). Judge Alarcon concurred in the majority opinion only "under compulsion of" prior Ninth Circuit precedent (*id.* at 29a).

whether the Supremacy Clause is a provision of the Constitution that "secures" "rights, privileges or immunities" within the meaning of Section 1983. See Pet. App. 26a (citation omitted) ("the Supremacy Clause 'is not a rights conferring provision that protects the individual against government intrusion' "); *J & J Anderson, Inc.* v. *Town of Erie*, 767 F.2d 1469, 1476-1477 (10th Cir. 1985); *Gould, Inc.* v. *Wisconsin Dep't of Industry*, 750 F.2d 608, 616 (7th Cir. 1984), aff'd on other grounds, 475 U.S. 282 (1986).

This approach rests upon a fundamental misunderstanding of the nature of a preemption claim. The federal interest vindicated by a preemption claim—the right to be free of state or local regulation that conflicts with or frustrates particular federal policies—is a "right, privilege or immunity" secured by the federal statute that preempts state law, not by the Supremacy Clause. That provision of the Constitution has no more relevance in this context than it does in an action under Section 1983 in which the plaintiff seeks redress for violations of a right expressly granted by a federal statute. The Supremacy Clause is the mechanism by which the legal rule enacted by Congress is made binding upon state and local officials; the source of the right in question, however, is federal statutory law.

Put another way, if the National Labor Relations Act contained a section explicitly stating that "no unit of state or local government shall withhold a license or franchise for the purpose of influencing the conduct of the licensee or franchisee in a labor dispute," it would be clear that the actions taken by the City of Los Angeles in this case would have violated a right secured by the NLRA, not by the Supremacy Clause. This Court's construction of the NLRA in *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986), shows that what happened here is legally indistinguishable from that situation.

For these reasons, the question whether Section 1983 supplies a cause of action for preemption claims is no different in kind from the question whether Section 1983 supplies relief for violations of other provisions of federal statutes, such as those before the Court in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), and *Wright* v. *City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987). The analysis developed in those cases for determining whether Section 1983 provides a remedy for violations of federal statutes should be applied in the preemption context as well.

B. Even if preemption rights are secured principally by the Supremacy Clause, with the federal statute playing only a subordinate role, there is no basis for excluding preemption claims from Section 1983. The statutory remedy extends to deprivations under color of state law of "*any* rights, privileges, or immunities secured by the Constitution and laws" (emphasis added). The Supremacy Clause indisputably is part of the Constitution, and any rights that it secures accordingly should be protected by Section 1983.

Chapman v. *Houston Welfare Rights Organization*, 441 U.S. 600 (1979), is not to the contrary. The Court in that case construed 28 U.S.C. § 1343(3) to hold that the Supremacy Clause standing alone does not "secure" rights within the meaning of the statute. That determination does not at all contradict the inescapable conclusion that the Supremacy Clause *and* a preemptive federal statute together "secure" rights against deprivations under color of state law.

Nor is there any merit to the suggestion that the Supremacy Clause merely "allocates power" between the state and federal governments and does not protect individual rights. The reason for the allocation of power in each instance of preemption is to prevent states or municipalities from interfering with federal rights

granted by Congress. As this Court recently noted in *Davis* v. *Michigan Dep't of the Treasury*, No. 87-1020 (Mar. 28, 1989), it does not follow that because a rule is structural it cannot give rise to individual rights. There is no distinction between preemption rights and other types of rights protected by Section 1983.

ARGUMENT

I. PREEMPTION CLAIMS ARE COGNIZABLE UNDER 42 U.S.C. § 1983

A. Because Preemption Claims Involve Rights Granted By Federal Statutes, The Question Presented In This Case Is Controlled By *Maine* v. *Thiboutot* And Its Progeny.

1. This Court has repeatedly emphasized that preemption of state law is the result of a congressional determination embodied in federal statutes. "The path to be followed in pre-emption cases is laid out by [the Court's] cases. It is accepted that *Congress has the authority, in exercising its Article I powers, to pre-empt state law.*" *California* v. *ARC America Corp.*, No. 87-1862 (Apr. 18, 1989), slip op. 5 (emphasis added). "In deciding whether a federal law pre-empts a state statute, [the Court's] task is to ascertain Congress' intent in enacting the federal statute at issue." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983); see also *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) ("'[t]he purpose of Congress is the ultimate touchstone'" in pre-emption cases) (citation omitted). The Court has noted that "[p]re-emption may be either express or implied, and "is compelled whether *Congress'* command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 152-153 (1982) (emphasis added) (quoting *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

Where a statute does not contain an express preemption provision, the Court applies a number of settled principles to determine whether Congress nonetheless intended to preempt state law. Thus, "state regulation in a particular field * * * is preempted when it actually conflicts with federal law." *Schneidewind* v. *ANR Pipeline Co.*, 108 S. Ct. 1145, 1150 (1988). Such a conflict will be found "when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" in enacting a statute. *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 581 (1987) (citation omitted). See, *e.g.*, *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 109 S. Ct. 971 (1989); *International Paper Co.* v. *Ouelette*, 479 U.S. 481, 491-492 (1982); *Chicago & North Western Trans. Co.*, v. *Kalo Brick & Title Co.*, 450 U.S. 311, 317 (1981). Similarly, even in the absence of a direct conflict between state and federal regulation,

> Congress' intent to supersede state law altogether may be inferred because '[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.'

Fidelity Federal Savings & Loan Ass'n, 458 U.S. at 153 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); see also *California* v. *ARC America Corp.*, slip op. 5.

In view of these basic principles, it is not surprising that this Court's disposition of preemption claims has turned exclusively upon an assessment of congressional

intent. If Congress intended, expressly or otherwise, to circumscribe the states' preexisting regulatory authority in order to accomplish the federal statutory goals, the Court has upheld the claim of preemption. See, *e.g.*, *Bennett* v. *Arkansas*, 108 S. Ct. 1204 (1988) (state garnishment statute preempted because it would frustrate Congress's intent in 42 U.S.C. § 407 to exempt social security benefits from legal process); *Perry* v. *Thomas*, 107 S. Ct. 2520 (1987) (state labor code preempted because it would frustrate Congress's intent in 9 U.S.C. § 2 to encourage contract claims to be settled by arbitration). In sum, the Court's analysis in preemption cases establishes beyond any doubt that these rights are rooted in federal statutes.

To be sure, the Constitution is not entirely irrelevant in preemption cases. The Supremacy Clause plays an important part because it is the mechanism by which Congress's will is imposed on state and local governments. But the role of the Supremacy Clause in the preemption context is no different from its role in any other situation in which federal law constrains the authority of states and localities. For example, without the Supremacy Clause, the provision of the Social Security Act at issue in *Maine* v. *Thiboutot*, *supra*, would not have been binding on the State of Maine. In both situations, the Supremacy Clause "is not a source of any federal rights, [but] it does 'secure' federal rights by according them priority whenever they come in conflict with state law. In that sense all federal rights, whether created by treaty, by statute, or by regulation, are 'secured' by the Supremacy Clause." *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 613 (1979).

2. Because preemption claims seek to vindicate federal statutory rights—not rights conferred by the Supremacy Clause—they are indistinguishable from other claims seeking redress for the deprivation under color of state law of "rights, privileges or immunities secured by • • • [federal] laws" (42 U.S.C. § 1983). This conclusion is confirmed by considering how Section 1983 applies with respect to rights conferred by three different types of federal statutes: one imposing an express obligation upon state and local governments, one containing an express provision denying states or localities authority to regulate in a particular area, and one in which Congress clearly intended to achieve the latter result, but failed to include an express preemption provision in the statute.

This Court already has held that Section 1983 generally provides a remedy for rights grounded in provisions of federal statutes that limit the authority of state and local governments. See *Wright*, 479 U.S. at 423-432 (statute prescribing rent that may be charged to tenants in federally-assisted housing); *Thiboutot*, 448 U.S. at 4-5 (statute granting welfare benefits). Accordingly, subject to two limitations discussed below (at 14-15), there can be no dispute that Section 1983 supplies a remedy for violations of such rights.

Congress sometimes enacts express statutory provisions that, rather than imposing affirmative obligations on state or local governments, instead forbid state officials from asserting any authority with respect to subjects of special federal concern. See, *e.g.*, 15 U.S.C. § 1476 (regulating the packaging of household goods in order to protect children); 29 U.S.C. § 1144 (ERISA); 46 U.S.C. § 4306 (standards governing recreational vessels). There is no basis for distinguishing these express statutory provisions from other express statutory provisions that limit the discretion of state and local officials, such as the statutes before the Court in *Wright* and *Thiboutot*. If, as the Court held in *Thiboutot*, 448 U.S. at 4, "the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law," then Section 1983 surely should encompass violations of express preemption provisions no less than any other statutory violations. See also *Wright*, 479 U.S. at 423.

The Section 1983 analysis should not change merely because the statutory preemption provision is implied rather than express. Here, for example, Congress could have included a provision in the National Labor Relations Act stating that "[s]tates [and local governments] are * * * prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts, unless such restrictions * * * [are authorized by federal law]" (*Golden State I*, 475 U.S. at 614-615 (citations omitted)). If the NLRA had been written in this manner, there could be little doubt that a challenge to state action on the ground that it violated this express preemption provision would constitute an action to vindicate a right secured by the federal statute. But this Court's decision in *Golden State I* makes clear that the preemption right conferred by the NLRA is no less real and enforceable because it is implied; and the Court's analysis in *Golden State I* establishes that the source of that right is the federal labor statute. Since federal law secures this right to be free of state or local regulation, the test for determining whether a violation of the right gives rise to an action under Section 1983 should be the same as the test applied with respect to the statutory rights already discussed.[4]

The foregoing discussion reveals the error in the court of appeals' reasoning. The court below concluded (Pet. App. 24a-25a) that Section 1983 is inapplicable here

[4] Indeed, it would be especially inappropriate to hold that preemption rights have less force because they are implied: the clarity of the basic contours of this Court's preemption jurisprudence may have led Congress to conclude that an express preemption provision is unnecessary where such a provision would simply reiterate those "usual" preemption rules. These statutory rights should not be given second-class status simply because Congress acted in reliance on the rules announced by this Court. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979); *Welch* v. *Texas Dep't of Highways*, 107 S. Ct. 2941, 2958 (1987) (Scalia, J. concurring in the judgment).

because there was no "direct violation" of the NLRA. But while the court correctly determined that the City's actions did not implicate the express statutory rights conferred upon the parties to a labor dispute vis-a-vis one another (see 29 U.S.C. § 158), it ignored the fact that the statute unquestionably confers a second type of right upon the parties—the right to engage in bargaining free of governmental interference. See *Golden State I*, 475 U.S. at 619. Moreover, the court below also ignored the fact that, as this Court's decision in *Golden State I* confirms, this second type of right is fully enforceable against state and local governments.

There is no reason why this implied right should be excluded from the class of rights protected under Section 1983. After all, that statute provides a remedy for the deprivation under color of state law of "*any* rights * * * secured by" federal law (emphasis added); see also *Thiboutot*, 448 U.S. at 6-8 (rejecting argument that Section 1983 protects only those statutory rights granted by civil rights laws); page 16, *infra*. The Court has rejected the notion that Section 1983 requires that a right be defined completely in the express language of the statute in order to be entitled to protection. See *Wright*, 479 U.S. at 430. Indeed, the legitimacy of judicial interpretation of statutes rests upon the principle that courts simply explicate the statutory text; that principle would be undermined if rights implied by courts on the basis of congressional intent were deemed inferior to rights expressly set forth in the statute.[5]

[5] The court of appeals also suggested (Pet. App. 26a-27a) that Section 1983 applies differently to the various categories of preemption claims: claims based upon a direct conflict between federal law and local law might be cognizable under Section 1983, while preemption claims resting on Congress's intent to preempt the field or on a conflict between local law and the purposes of federal law would be excluded from Section 1983. See also *White Mountain Apache* v. *Williams*, 810 F.2d 844, 850 (9th Cir.), cert. denied, 479 U.S. 1060 (1987). But *all* preemption claims rest upon rights conferred by

3. The Court has recognized two situations in which Section 1983 will not provide a remedy for statutory violations: "where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges or immunities within the meaning of § 1983." *Wright*, 479 U.S. at 423; see also *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1 (1981). Neither of these exceptions is applicable here.

First, as we have discussed, *Golden State I* makes clear that the NLRA creates an enforceable right against interference in the collective bargaining process by state actors—this Court established as much when it upheld Golden State's preemption claim three years ago. See *Golden State I*, 475 U.S. at 619. This plainly is not a case in which the statute "indicat[es] no more than a congressional preference—at most a 'nudge in the preferred directio[n],' * * * not * * * ris[ing] to the level of an enforceable right." *Wright*, 479 U.S. at 423 (citation omitted); compare *Pennhurst*, 451 U.S. at 27 (statute did not create enforceable rights because it "impose[d] * * * [no] binding obligations on the States").

Second, Congress has not foreclosed resort to Section 1983 to enforce the statutory right at issue in this case. Los Angeles bears the burden of showing that "the remedial devices provided in a particular Act are sufficiently comprehensive * * * to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Middlesex County Sewerage Authority*, 453 U.S. at 20. The Court "'do[es] not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally secured right." *Wright*, 479 U.S. at 423-424 (quoting *Smith* v. *Robinson*, 468 U.S. 992, 1012 (1984)).

federal law. Unless the general limitations upon Section 1983 actions grounded in federal statutory rights (see pages 14-15, *infra*) apply in a particular case, there is no reasoned justification for picking and choosing among preemption rights to determine which of those rights are protected by Section 1983.

This Court has found the requisite congressional intent to preclude suit under Section 1983 only where "the statutes at issue themselves provided for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy." *Wright*, 479 U.S. at 427 (citing *Middlesex County Sewerage Authority* and *Smith*). Congress did establish a remedial mechanism for violations of *some* of the rights secured by the NLRA. The rights of unions and employers to be free of unfair labor practices committed by one another may be vindicated through an administrative remedy within the jurisdiction of the National Labor Relations Board (NLRB). See 29 U.S.C. § 160. But that remedial mechanism is totally irrelevant here: because Los Angeles was not a party to the labor dispute, Golden State could not obtain relief against the City in an administrative proceeding before the NLRB. In view of the absence of any statutory remedial scheme for the vindication of the right to be free of governmental interference in the collective bargaining process, the City cannot show that Congress intended to bar Section 1983 actions in this context.[6]

B. Even If Preemption Claims Are Rooted Principally In The Supremacy Clause, Such Claims Are Encompassed Within Section 1983.

Even if the Court concludes that preemption rights are "secured" in large part by the Supremacy Clause itself, rather than by the relevant statute, preemption

[6] In *Wright*, the Court rejected the argument that Congress's decision to vest enforcement authority in the federal government demonstrated that Congress intended to preclude private actions under Section 1983. See 479 U.S. at 424-428. This is an *a fortiori* case, because even the NLRB does not have the authority to bring an action to enforce Golden State's right to be free from governmental interference.

claims still should be held cognizable under Section 1983. Such rights plainly are not secured solely by the Supremacy Clause; as we have discussed, they flow in considerable part from federal statutes. Any enhanced role that the Supremacy Clause plays in this context provides no basis for excluding preemption claims from the ambit of Section 1983.

1. *The Statutory Language And Legislative History Establish That Section 1983 Extends To Preemption Claims.*

Section 1983 provides a remedy for the deprivation under color of state law of "*any* rights, privileges, or immunities secured by the Constitution and laws" (emphasis added). The term "any" generally means a thing "selected without restriction or limitation of choice"; when used as a modifier as in Section 1983 "any" indicates "the maximum or whole of a number or quantity." *Webster's Third New International Dictionary* 97 (4th ed. 1976). Congress's choice of words shows that it intended this remedial statute to have the widest possible compass. The statute could not have been drafted to be any more inclusive. See *United States* v. *James*, 478 U.S. 597, 604-605 (1986).

Indeed, this Court already has concluded that Section 1983 "must be given the meaning and sweep that * * * [its] language dictate[s]"; the remedy extends to rights secured by "*all* of the Constitution and laws of the United States." *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 549 & n.16 (1972) (emphasis in original) (quoting *United States* v. *Price*, 383 U.S. 787, 797 (1966)). See also *Monell* v. *Dep't of Social Services*, 436 U.S. 658, 700 (1978) ("there can be no doubt that [Section 1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights"). The Supremacy Clause obviously is a part—indeed, a critically important part—of the Constitution. Thus, to the extent that preemption rights are

"secured" by the Supremacy Clause, the broad language of Section 1983 establishes that the statute provides a remedy when such rights are violated by a person acting under color of state law. See *Thiboutot*, 448 U.S. at 6-8 (refusing to limit Section 1983's plain language).

The breadth and clarity of the text of Section 1983 eliminate any need to consult the provision's legislative history. See *United States* v. *Ron Pair Enterprises*, 109 S. Ct. 1026, 1030 (1989) ("where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms'"); *United States* v. *Locke*, 471 U.S. 84, 95-96 (1985). In any event, the legislative history simply confirms that Congress meant what it said when it enacted Section 1983.

There was no suggestion at the time that Section 1983 was enacted that some constitutional rights were to be excluded from the statutory remedy. To the contrary, one congressman stated that "[t]he word 'rights' is generic, embracing all that may be lawfully claimed." Cong. Globe, 42d Cong., 1st Sess. App. 47 (1871) (Rep. Kerr). Others stressed the broad application of the new remedy. See *id.* at App. 313 (Rep. Burchard); *id.* at App. 217 (Sen. Thurman) (leader of the opposition) ("there is no limitation whatsoever on the terms that are employed, and they are as comprehensive as can be used"). See also *Monell*, 436 U.S. at 683-686 (summarizing legislative history). There is certainly no indication that Congress intended the Supremacy Clause to be treated differently than other provisions of the Constitution.[7]

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[7] One congressman did distinguish between provisions of the Constitution that "relate to the divisions of the political powers of the State and General Governments" and those securing "the rights or the liabilities of persons within the States, as between such persons and the States." Cong. Globe, 42d Cong., 1st Sess. App. 69 (1871) (Rep. Shellabarger). But, as the Court explained in *Monell*, 436 U.S. at 670-672, these statements were made in the course of the debate over the Sherman Amendment, a provision that was not

2. *Neither Precedent Nor Policy Supports A Restrictive Interpretation Of Section 1983.*

Even though the plain language and legislative history of Section 1983 leave no room for the importation of "ingenious analytical instruments" to limit the statute's scope (*United States* v. *Price*, 383 U.S. at 801), a number of lower courts have concluded that preemption claims are not cognizable under Section 1983. The reasons advanced by these courts do not withstand analysis.

a. Several lower courts have relied heavily upon this Court's decision in *Chapman* v. *Houston Welfare Rights Organization*, *supra*. See, *e.g.*, *White Mountain Apache Tribe* v. *Williams*, 810 F.2d 844, 848 (9th Cir.), cert. denied, 479 U.S. 1060 (1987); *J & J Anderson, Inc.*, 767 F.2d at 1476-1477. *Chapman*, however, concerned the construction of a different statute, 28 U.S.C. § 1343(3), which endows the federal district courts with jurisdiction over cases involving rights "secured by the Constitution • • • or by any Act of Congress providing for equal rights." The issue was whether Section 1343(3) conferred jurisdiction over claims seeking redress for alleged violations of the Social Security Act.

The Court first considered the plaintiffs' contention that the right at issue was "secured" solely by the Supremacy

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enacted into law that would have given persons injured in race riots a cause of action for damages against the municipality in which the riot occurred. Representative Shellabarger argued that an additional statutory provision was needed to enforce rights secured by the Privileges and Immunities Clause, not that other constitutional rights fell completely outside the scope of Section 1983.

Moreover, even if Representative Shellabarger's remarks could be read to suggest that rights secured by certain parts of the Constitution are not protected under Section 1983, the examples that he cited—such as the provision prohibiting the states from coining money—are far afield from preemption claims, which rest in part upon federal statutes in which Congress specifically intended to secure individual federal rights, including the right to be free of inconsistent state regulation. See also pages 20-21, *infra*.

Clause, because that provision of the Constitution obligates the states to follow federal law. The Court observed that the plaintiffs' interpretation of Section 1343(3) would effectively transform all violations of federal statutes into constitutional violations as to which a claim could be asserted in federal court, and thus would negate Congress's decision to limit jurisdiction over statutory violations to those statutes "providing for equal rights." The Court declined to interpret Section 1343(3) in that manner because "it would make little sense for Congress to have drafted the statute as it did if it had intended to confer jurisdiction over every conceivable federal claim against a state agent." 441 U.S. at 615. The Court went on to reject the plaintiffs' alternative argument, holding that the Social Security Act is not a law "providing for equal rights" within the meaning of Section 1343(3).

Chapman is wholly irrelevant here. Preemption rights do not rest solely upon the Supremacy Clause; as we argue above, they are secured in part—if not entirely—by federal statutes. Thus, *Chapman*'s holding that the Supremacy Clause *alone* does not "secur[e]" rights sheds no light on whether a right secured by *both* the Supremacy Clause *and* a federal statute may form the basis of an action under Section 1983. Indeed, because the Court held that the statute upon which the plaintiffs in *Chapman* relied—the Social Security Act—was outside the ambit of Section 1343(3), it could only consider whether the Supremacy Clause alone satisfied the statutory test. Section 1983, by contrast, is not limited to statutes protecting equal rights. See *Thiboutot*, 448 U.S. at 6-8. This case therefore presents a question that the Court could not address in *Chapman*: whether a right secured by the Supremacy Clause and a federal statute operating in tandem is cognizable under Section 1983.

b. Another argument advanced by the lower courts that have excluded preemption claims from the scope of Section 1983 is that the Supremacy Clause "is essentially a

power conferring provision, one that allocates authority between the national and state governments; thus, it is not a rights conferring provision that protects the individual against government intrusion." *White Mountain Apache*, 810 F.2d at 848; see also *Gould, Inc.*, 750 F.2d at 616.[8] While it is true as an abstract matter that the Supremacy Clause may be said to "allocate" governmental authority, that myopic view ignores the reason for the allocation: to prevent state or local governments from interfering with Congress's grant of statutory rights. The Supremacy Clause and the preemptive statute only incidentally resolve a "turf battle" between the federal government and the states. As the facts of this case illustrate, preemption provisions unquestionably are intended to secure individual rights—*i.e.*, rights, granted by Congress and enforced by the Supremacy Clause, to be free of state or local regulation that would frustrate federal goals. There is absolutely no basis for according second-class status to this category of federal rights.

Thus, the NLRA does not divide regulatory authority between the federal and state governments simply to avoid regulatory collisions. It prohibits *state* interference with collective bargaining in order to secure the *federal* right that the statute confers upon employers and employees—the right to engage in "the free use of economic weapons during the course of" a labor dispute. *Golden State I*, 475 U.S. at 617. See also *id.* at 619 (the NLRA reflects "Congress' decision to leave open the use of economic weapons" without governmental interference).

[8] These courts also may be motivated in part by hostility to claims seeking redress for violations of property rights. But this Court has squarely rejected the contention that Section 1983 protects "personal" rights and not property rights. As the Court remarked in *Lynch*, 405 U.S. at 552, "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. * * * [A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized."

Federal labor law, for example, grants employees the right to engage in an economic strike to achieve better wages, hours, and working conditions. See 29 U.S.C. § 157. If, in this case, Los Angeles had coerced union members to end their strike by threatening to revoke their drivers' licenses unless they went back to work, there could be no question that such action would interfere with the employees' federal rights under the NLRA. By the same token, by using its regulatory power over Golden State's operating franchise to coerce the company into settling the dispute with its employees, Los Angeles' conduct plainly interfered with Golden State's rights under federal labor law. See Monaghan, *Third Party Standing*, 84 Colum. L. Rev. 277, 312 n.187 (1984).

The foregoing observations are not limited to this particular context. Congress's decision to limit or eliminate state regulation almost always will be motivated by a desire to secure rights conferred upon persons subject to the preempting federal statute—whether a right to be free of government regulation altogether (see, *e.g.*, *Bonito Boats, Inc.*, 109 S. Ct. at 981; *Transcontinental Gas Pipeline Corp.* v. *State Oil & Gas Board*, 474 U.S. 409, 422 (1986)) or a right to be free of regulation other than that imposed by the federal government. See, *e.g.*, *Perry*, 107 S. Ct. at 2526. It would be anomalous if Section 1983 were not available to remedy a state's interference with such federal rights.[9]

Indeed, this Court recently rejected a similar argument that structural rules do not give rise to individual rights. In *Davis* v. *Michigan Dep't of the Treasury*, No. 87-1020 (Mar. 28, 1989), a case involving the intergovernmental tax immunity doctrine, the State argued that an individual taxpayer could not claim the protection of the immunity doctrine because its purpose was "to pro-

[9] The fact that private parties have standing to assert preemption claims is strong evidence that preemption rules secure individual rights.

tect governments and not private entities or individuals" (slip op. 10). This Court disagreed, holding that an individual could maintain such a claim: "[i]t is true that intergovernmental tax immunity is based on the need to protect each sovereign's governmental operations from undue interference by the other. But it does not follow that private entities or individuals who are subjected to discriminatory taxation on account of their dealings with a sovereign cannot themselves receive the protection of the constitutional doctrine. Indeed, all precedent is to the contrary" (*ibid.* (citations omitted)). The same conclusion is appropriate here.

c. Lurking behind these arguments may be the concern that permitting preemption claims to be brought under Section 1983 would result in the imposition of substantial monetary liability upon municipalities, which do not have the benefit of an immunity defense. See *Owen* v. *City of Independence*, 445 U.S. 622 (1980). There is, of course, no unfairness in requiring a wrongdoer to compensate a victim for the injuries caused by its wrongdoing. *Id.* at 651. But even if there were, this policy concern certainly provides no justification for ignoring Congress's unambiguous intent to create a broad remedy under Section 1983 for violations of federal rights. See *id.* at 654; *Monell*, 436 U.S. at 690.

In any event, it is not at all clear that permitting plaintiffs to assert preemption claims under Section 1983 would trigger a flood of large damages awards. To begin with, many suits charging that state or local regulations are preempted by federal law are brought before the laws become effective. Victorious plaintiffs in such actions would be entitled only to declaratory or injunctive relief (and attorneys' fees under 42 U.S.C. § 1988), rather than damages. Moreover, even if retrospective relief is sought, a plaintiff would have to establish causation and prove its damages with the requisite degree of certainty. See *Memphis Community School District* v. *Stachura*, 477

U.S. 299, 306 (1986); *Carey* v. *Piphus*, 435 U.S. 247 (1978). Finally, many other defenses, such as the statute of limitations, would limit the class of plaintiffs entitled to monetary relief and the amount of damages in the event that a state or local regulation were held to be preempted. These generally applicable standards serve to limit defendants' financial exposure under Section 1983.

Finally, some cases might result in damages awards for harm incurred by businesses, but that outcome would hardly be unique under Section 1983. Local regulation touching property rights also may render a municipality liable in damages to a potentially large class of plaintiffs. See, *e.g.*, *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 107 S. Ct. 2378 (1987); *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488 (1976). The policy argument that such awards impose an unreasonable burden on local government, if such an argument ever should prove to be justified, "must be addressed to the body that has the authority to amend the legislation, rather than one whose authority is limited to interpreting it." *Laborers Health & Welfare Tr.* v. *Advanced Lightweight Concrete Co.*, 108 S. Ct. 830, 837 (1988).

II. THE COURT SHOULD NOT RESOLVE IN THIS CASE THE SEPARATE QUESTION WHETHER COMMERCE CLAUSE CLAIMS ARE COGNIZABLE UNDER 42 U.S.C. § 1983

Several lower courts have lumped together Supremacy Clause rights and rights conferred by the dormant Commerce Clause for purposes of determining Section 1983's remedial scope, advancing virtually identical justifications for their conclusions that Section 1983 does not supply a remedy for violations of either right. See, *e.g.*, *White Mountain Apache Tribe*, 810 F.2d at 849-850; *Consolidated Freightways Corp.* v. *Kassel*, 730 F.2d 1139, 1144 (8th Cir.), cert. denied, 469 U.S. 834 (1984). Regardless of this Court's determination with respect to the

issue presented here concerning the applicability of Section 1983 to preemption claims, the Court should recognize that the resolution of that issue is not dispositive of the question whether Section 1983 encompasses violations of Commerce Clause rights.

As we have discussed, preemption rights are secured entirely, or at least in part, by federal statutes. In the absence of the exercise of congressional authority through the enactment of a federal statute, the Supremacy Clause does not secure substantive federal rights.

The Commerce Clause, by contrast, is a self-effectuating provision of the Constitution. Like the First Amendment or the Due Process Clause, the Commerce Clause on its own authority invalidates state laws that violate the constitutional command. By striking down state laws that impermissibly burden interstate commerce, the Commerce Clause secures the federal constitutional right to engage in interstate commerce free from state protectionist laws; this Court has "steadfastly adhered to the central tenet that the Commerce Clause 'by its own force created an area of trade free from interference by the States.'" *Scheiner*, 107 S. Ct. at 2838 (quoting *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 328 (1977)); see also Note, *Dormant Commerce Clause Claims Under 42 U.S.C. § 1983: Protecting the Right To Be Free of Protectionist State Action*, 86 Mich. L. Rev. 157, 164-167 (1987).

As early as *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824), Chief Justice Marshall recognized a "right" of constitutional dimensions to engage in "intercourse between state and state." Over the years, this Court has had frequent occasions to reemphasize that the right "[t]o carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States." *Crutcher* v. *Kentucky*, 141 U.S. 47, 57 (1891); see also *Garrity*

v. *New Jersey*, 385 U.S. 493, 500 (1967) ("[t]here are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one").

Thus, whatever may be said of the Supremacy Clause, the Commerce Clause does not merely allocate power between the federal government and the states, but secures personal rights as well. These rights affect the liberty of American citizens to transact business on a national scale, free from burdens imposed by local legislatures that may be beholden to narrow, parochial interests. Commerce Clause rights are fundamental to the national citizenship that the Constitution was established to secure. See, *e.g.*, 3 *The Records of the Federal Convention of 1787*, at 478 (M. Farrand ed. 1937) (principal function of the Commerce Clause was to protect those engaged in interstate commerce from local interference). These rights surely are protected by Section 1983.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE

BRIEF

No. 88-840

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IN THE

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OCTOBER TERM, 1988

GOLDEN STATE TRANSIT CORP.,
Petitioner,

v.

CITY OF LOS ANGELES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The Court directed the parties to brief the following question:

Whether in the absence of a direct violation of a federal statute, an allegation that a state statute is preempted by a federal statute is cognizable under 42 U.S.C. Section 1983.

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling and continuing interest in the issue presented here: when local governments may be held liable under 42 U.S.C. § 1983 for violating federal law.

The issue here grows out of the Court's holding in an earlier phase of this case that respondent's decision not to renew petitioner's taxicab franchise was preempted by the National Labor Relations Act, 29 U.S.C. § 151 *et seq. Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986). Upon remand from this Court's decision, petitioner asserted that it was entitled to damages from respondent under Section 1983. The claim was denied by both courts below.

Because local governments and local officials often are challenged in actions brought under Section 1983, *amici* and their members will be directly affected by the rules that this Court sets down to determine when Section 1983 defendants may be held liable for acting in a manner that is inconsistent with federal law. The broad and often uncertain scope of federal law makes it inevitable that local regulatory activity occasionally will be found to be preempted by federal statutes. If damages are too readily available as a remedy, local governments and officials may face potentially ruinous liability. At the same time, the prospect of paying such awards may discourage local governments from engaging in legitimate and productive regulatory activity. For these reasons, *amici* submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT

Petitioner operated a taxicab company in Los Angeles. In early 1981, while petitioner's application for a renewal of its franchise was pending, its unionized drivers commenced a strike. According to the Court's prior decision in this case, respondent conditioned the franchise renewal on settlement of the strike. *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 615-616 & n.6 (1986) (*Golden State I*) (reprinted at Pet. App. 1a-17a). Petitioner failed to settle the strike and the franchise was not renewed.

[1] The parties' letters of consent pursuant to Rule 36 of the Rules of this Court have been filed with the Clerk of the Court.

Petitioner then initiated this action against respondent in federal district court, alleging, among other things, that the condition imposed by respondent on the franchise renewal was preempted by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* After several years of litigation the case reached this Court, which ruled for petitioner. The Court held that the NLRA prohibits state and local governments from restricting employers or unions in their use of "economic weapons of self-help" during labor actions (*Golden State I*, 475 U.S. at 614). Here, the Court concluded, "[t]he settlement condition imposed by the Los Angeles City Council * * * destroyed the balance of power designed by Congress, and frustrated Congress' decision to leave open the use of economic weapons" (*id.* at 619). The Court remanded the case for further proceedings.

On remand, the district court ordered respondent to grant petitioner a four-year franchise and awarded ancillary monetary relief. The district court also held, however, that the inconsistency of respondent's actions with the NLRA was not cognizable under 42 U.S.C. § 1983 in an action for damages. Pet. App. 22a. On interlocutory appeal, the court of appeals affirmed (*id.* at 18a-31a). Relying on *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), and its prior decision in *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir.), cert. denied, 479 U.S. 1060 (1987), the court of appeals held that petitioner could not bring a Section 1983 action to challenge respondent's failure to comply with the NLRA because no "right, privilege, or immunity secured by the NLRA was 'violated' by the City" (Pet. App. 24a). Alternatively, the court held that a Section 1983 action for damages was precluded under *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), be-

cause "'the remedial devices provided in [the NLRA] are sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under section 1983'" (Pet. App. 25a, quoting *Wright*, 479 U.S. at 423). The court also held that respondent's violation of the Supremacy Clause would not itself support an action under Section 1983 (Pet. App. 26a-27a).[2]

This Court then granted certiorari, directing the parties to brief the question "[w]hether in the absence of a direct violation of a federal statute, an allegation that a state statute is preempted by a federal statute is cognizable under 42 U.S.C. Section 1983."

SUMMARY OF ARGUMENT

1. In our view, the Court should dismiss the writ of certiorari as improvidently granted. The question posed by the Court—whether an allegation of preemption is cognizable under Section 1983 "in the absence of a direct violation of a federal statute"—is not meaningfully presented on the facts here. Whenever state activity is displaced because it obstructs federal goals (as the Court found was true of respondent's actions in this case) there necessarily will have been a "direct violation" of the provisions of federal law that (implicitly or explicitly) precluded the state conduct. See *Schneidewind v. ANR Pipeline Co.*, 108 S.Ct. 1145, 1150 (1988). And perhaps more fundamentally, implications that may be drawn from the Court's question misdirect the inquiry. The availability of a Section 1983 action does not turn on the "directness" of the violation of federal law; the focus of the inquiry instead should be on whether the federal statute that has preemptive force creates "rights" within the meaning of Section 1983.

---

[2] Judge Alarcon concurred (Pet. App. 29a-31a). He stated that, in his view, respondent had deprived petitioner of rights secured by law within the meaning of Section 1983; he concluded, however, that he was bound by circuit precedent to join the court's opinion.

2. At the outset, a simple finding of preemption—that is, a finding that a state or local government violated the Supremacy Clause—is not, standing alone, cognizable under Section 1983. That was settled in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 615 (1979), which held that a Supremacy Clause violation does not give rise to a claim "secured by the Constitution" within the meaning of 28 U.S.C. § 1343(3), a statute that is Section 1983's jurisdictional counterpart and that is in relevant part identical to Section 1983. Indeed, Section 1983's reference to deprivations of rights secured by "law" would be wholly unnecessary if Supremacy Clause violations as such could be challenged under the statute. There is nothing anomalous in this conclusion. The Supremacy Clause, after all, simply effectuates *other* provisions of the Constitution and federal law; the Clause itself is not a source of any substantive federal rights.

3. Because violations of the Supremacy Clause are not themselves cognizable, the issue in a Section 1983 action grounded on preemption must be whether the defendant's violation of the underlying statute deprived the plaintiff of "rights * * * secured by the * * * laws" of the United States. As the Court's decisions in *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), and *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), make clear, there are several prerequisites to a finding that a statute creates "rights": the statute must have been passed for the special benefit of persons like the plaintiff; Congress must have intended the statute's requirements to be enforceable; and the statute must establish reasonably specific and judicially manageable standards of conduct. This is a familiar sort of inquiry, which the Court has long conducted in determining whether statutes create rights that may be privately enforced. And it is a test that has been widely followed by the courts of appeals—including the Ninth Circuit.

While the ultimate focus of the inquiry must remain the meaning of the underlying statute, the nature of the preemption in the case may shed considerable light on Congress's intentions. When Congress "preempts the field," for example, or preempts state regulation to secure the primacy of a federal agency, it typically acts to safeguard federal regulatory prerogatives rather than to protect the rights of individuals. Indeed, a federal statute that preempts the field will displace even state laws that share the goals and substantive reach of the federal legislation; when a regulated party seeks to displace state regulatory efforts in such circumstances, it hardly can be said that the plaintiff has been denied a substantive right to engage in conduct protected by federal law. Beyond that, when Congress fails to take the trouble to preempt state law expressly, the preemptive effect that may be inferred from the simple existence of federal regulatory activity is unlikely, as a general matter, to have been specifically intended to create an individual right to freedom from state regulation.

4. There are strong arguments that the NLRA does not create "rights" that are enforceable against local governments under Section 1983. The NLRA does not, of course, expressly create rights of that sort, and there is no indication that the statute was designed to create enforceable entitlements for the benefit of individual employers or unions. Having said this, however, we believe that there is no need for the Court to reach out to apply this test to the facts here. The lower courts do not need guidance in this area, and the issues whether and when the NLRA creates rights are not recurring ones. Because the dispositive issue—Congress's intent in enacting the NLRA—is not squarely subsumed within the question presented and has not been directly joined by the parties, it would be appropriate for the Court to dismiss the petition as improvidently granted.

ARGUMENT

We urge the Court to dismiss the writ of certiorari in this case as improvidently granted. In our view, the question presented here, as written by the Court, is not meaningfully present on the facts of the case. And perhaps more fundamentally, implications that may be drawn from the question about the nature of preemption threaten to direct attention away from what should be the dispositive issues in cases of this sort.

The Court directed the parties to brief the question whether, "in the absence of a direct violation of a federal statute, an allegation that a state statute is preempted by a federal statute is cognizable under 42 U.S.C. Section 1983." But whenever state activity is invalidated because it frustrates congressional goals there necessarily will have been a "direct violation" of the provisions of federal law that (either explicitly or implicitly) prohibited the state conduct; the state activity will be in "actual[] conflict[] with federal law." *Schneidewind v. ANR Pipeline Co.*, 108 S.Ct. 1145, 1150 (1988). See *California v. ARC America Corp.*, No. 87-1862 (Apr. 18, 1989), slip op. 5; *Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Marketing & Bargaining Board*, 467 U.S. 461, 469 (1984). That certainly is the case here: the Court held in *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) (*Golden State I*), that the NLRA should be read as "prohibit[ing] [States] from imposing additional restrictions on economic weapons of self-help." *Id.* at 614. Granting the Court's factual conclusion in *Golden State I* that respondent interfered with the bargaining process, respondent's conduct was, in every sense, a direct violation of this requirement, and the assumption that the Court has postulated for the parties—"the absence of a direct violation of federal law"—is accordingly inconsistent with the facts of this case.

This is not to say, we hasten to add, that petitioner is entitled to challenge respondent's conduct under Section

1983. In fact, in our view the Court's question, which seemingly posits a dichotomy between "direct violations" of federal law and all other preemption cases, threatens to misdirect the inquiry. As we explain below, the availability of a Section 1983 action does not turn on the "directness" of the violation of federal law or on the simple existence of preemption; the focus must be on whether the federal statute that has preemptive force creates "rights" within the meaning of Section 1983 that were infringed by state action.[3] This is a complex inquiry that requires consideration of Congress's intent in enacting the statute involved, here the NLRA. That issue is addressed only in passing by petitioner (Br. 20-21, 26-27) and not at all by respondent.

In the following sections of this brief we set out what we believe to be the proper analysis in Section 1983 preemption cases. Again, however, because the questions raised by this analysis were not posed by the Court—and

[3] Even when the statute at issue creates a "right," an action will not be available under Section 1983 if "the remedial mechanisms provided [in the statute are] sufficiently comprehensive and effective to raise a clear inference that Congress intended to foreclose a § 1983 cause of action." *Wright*, 479 U.S. at 425. See *Smith v. Robinson*, 468 U.S. 992, 1012 (1984); *Sea Clammers*, 453 U.S. at 19-21. Here, the court of appeals concluded that the remedial devices provided by the NLRA " 'are sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under section 1983.' " Pet. App. 25a, quoting *Wright*, 479 U.S. at 423. Because the preclusion issue is not squarely subsumed within the question presented, we do not address it here. We note, however, that Congress plainly was aware that the NLRA would bar state action that interfered with the processes of collective bargaining; the foundation of the Court's holding in *Golden State I* was its conclusion that Congress *intended* the NLRA to have that effect. Yet Congress, while creating comprehensive and exclusive remedial provisions to deal with other sorts of violations of the Act—provisions that require the involvement of the National Labor Relations Board prior to judicial review (see 29 U.S.C. §§ 159, 160) —did not create a remedy for violations of the NLRA by state or local governments. This certainly suggests that Congress intended to preclude the recognition of judicial remedies for such violations.

because the dispositive issues have not been squarely joined by the parties—we believe that the Court should not in the first instance apply this test to the particular facts here.

I. A VIOLATION OF THE SUPREMACY CLAUSE IS NOT COGNIZABLE UNDER 42 U.S.C. § 1983

1. At the outset, the simple fact of preemption—that is, a finding that a state or local government violated the Supremacy Clause by acting in a manner that is precluded by federal law—does not, standing alone, establish that anyone was denied a "right, privilege, or immunity secured by the Constitution" within the meaning of Section 1983. *In Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 615 (1979), the court held that "an allegation of incompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim 'secured by the Constitution' " under 28 U.S.C. § 1343(3), Section 1983's "jurisdictional counterpart." That holding is dispositive of petitioner's claim (Br. 13-17) that a violation of the Supremacy Clause (as opposed to a deprivation of rights secured by particular federal statutes) is cognizable under Section 1983.

While the full texts of Sections 1983 and 1343(3) now differ in part,[4] the relevant portions of the two statutes are identical: both reach deprivations "of any right, privilege, or immunity secured by the Constitution." This language was derived from a common predecesor, Section 1 of the Civil Rights Act of 1871, and it has remained unchanged in every subsequent reenactment of each statute. See *Chapman*, 441 U.S. at 608-611 & nn.

[4] Section 1983 provides a cause of action for the deprivation "of any rights, privileges, or immunities secured by the Constitution and laws." Section 1343(3) gives the district courts jurisdiction to entertain claims stemming from the deprivation "of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights."

15, 16. It is therefore hardly likely that Congress intended the meaning of the language to differ from one statute to the other.

In any event, the Court's reasoning in *Chapman* is squarely applicable here. The *Chapman* Court, noting that Section 1343(3) reaches claims secured both by the Constitution and by "an Act of Congress 'providing for equal rights'," reasoned that "the entire reference in § 1343(3) to rights secured by an Act of Congress would be unnecessary if the earlier reference to constitutional claims embraced those resting solely on the Supremacy Clause." 441 U.S. at 615. The same observation is true of Section 1983, which of course refers to the deprivation of rights secured by the Constitution "and laws"; if the Supremacy Clause itself were understood to secure constitutional rights, the reference to "laws" would have been wholly unnecessary and "it would make little sense for Congress to have drafted the statute as it did." 441 U.S. at 615. The evolution of Section 1983 makes this doubly clear, since the words "and laws" were specially added to the provision in 1874 with the enactment of the Revised Statutes. See *Chapman*, 441 U.S. at 608-609.[5]

2. There is nothing anomalous in concluding that a violation of the Supremacy Clause does not infringe individual "rights, privileges, or immunities." By its

[5] Petitioner (Br. 13-14 & n.12) reads *Chapman* to support the proposition that the Supremacy Clause "secures" federal rights within the meaning of Section 1343(3). In fact, while the Court suggested that Section 1343(3) might plausibly be read to encompass Supremacy Clause claims (441 U.S. at 613), it went on to reject that reading: "In order to give meaning to the entire statute as written by Congress, we must conclude that an allegation of incompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim 'secured by the Constitution' within the meaning of § 1343(3)." 441 U.S. at 615. *Amicus* American Trucking Associations elliptically recognizes (Br. 19 (emphasis in original)) "*Chapman*'s holding that the Supremacy Clause *alone* does not 'secur[e]' rights."

terms, the Clause—like Section 1983 (see *Chapman*, 441 U.S. at 618)—simply effectuates other provisions of the Constitution or federal law; the Clause itself "is not a *source* of any federal rights." *Id.* at 613 (emphasis added). Of course, those other provisions often do confer rights, and deprivations of those rights may be actionable under Section 1983. But when a statute or constitutional provision that is given force by the Supremacy Clause does not create a right within the meaning of Section 1983, a plaintiff cannot bootstrap a violation of that underlying provision into a Section 1983 action by asserting that he was denied his "rights" under the Supremacy Clause.

In fact, as the courts of appeals have uniformly recognized, the Supremacy Clause "is essentially a power conferring provision, one that allocates authority between the national and state governments; thus, it is not a rights conferring provision that protects the individual against government intrusion." *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848 (9th Cir.), cert. denied, 479 U.S. 1060 (1987). See *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1476 (10th Cir. 1985); *Gould, Inc. v. Wisconsin Department of Industry*, 750 F.2d 608, 616 & n.16 (7th Cir. 1984), aff'd on other grounds, 475 U.S. 282 (1986); *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1143-1144 (8th Cir.), cert. denied, 469 U.S. 834 (1984). Cf. *Pirolo v. City of Clearwater*, 711 F.2d 1006, 1010-1011 (11th Cir. 1983).[6]

[6] As Professor Choper has explained:

> when it is alleged that an attempted state regulation intrudes into an area of exclusively national concern, the constitutional issue is wholly different from that posed by an assertion that certain government action abridges a personal liberty secured by the Constitution. * * * [W]hen a person alleges that one of the federalism provisions of the constitution has been violated, he implicitly concedes that one of the two levels of government—national or state—has the power to engage in the questioned conduct. The core of the argument is simply that

Amicus American Trucking Associations (ATA) takes issue with this proposition (Br. 19-21), suggesting that the Clause is designed "to prevent state or local governments from interfering with Congress's grant of statutory rights" (Br. 20). But this argument is based on a non sequitur. When a federal statute does create "rights" within the meaning of Section 1983, those rights may in some sense be secured by the Supremacy Clause. When the statute does not create rights (and there are many such statutes, as we explain below), however, the Clause itself does not magically become a "rights conferring provision."

Despite petitioner's contentions to the contrary (Br. 15-16), this conclusion is entirely consistent with the legislative history of Section 1983. The argument by petitioner and ATA (Br. 16-17) that Section 1983 safeguards all federal "rights" plainly is circular, since it begs the question whether the Supremacy Clause is itself a source of federal rights. And while the congressional debate about Section 1983 was replete with boilerplate references to the legislation's broad scope—some of which are duly noted by ATA (Br. 17)—every specific description of the constitutional rights protected by Section 1 of the 1871 Civil Rights Act referred only to recognizably individual rights: the equal protection and due process rights created by the Fourteenth Amendment and the various rights guaranteed by the first eight amendments to the Constitution. See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. 475-476 (1871) (remarks of Rep. Dawes) (bill of rights); Cong. Globe, 42d Cong., 1st Sess. App. 84-85 (1871) (remarks of Rep. Bingham) (equal protection, first eight amendments, and "rights of conscience"); *id.* at 153 (remarks of Rep. Garfield) (equal protection). See

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the particular government that has acted is the constitutionally improper one.

J. Choper, *Judicial Review and the National Political Process* 174-175 (1980). See *id.* at 196, 201-202.

generally *Monell v. Department of Social Services*, 436 U.S. 658, 665, 683-689 (1978); Note, *Development: Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1153-1156 (1977).[7]

Indeed, Representative Shellabarger, who introduced the bill that became Section 1983 and was one of the bill's principal sponsors in the House (see *Monell*, 436 U.S. at 665, 669), expressly distinguished between provisions of the Constitution that allocate power and those that create individual rights:

> Most of the provisions of the Constitution which restrain and directly relate to the States * * * relate to the divisions of the political powers of the State and General Governments. * * * These prohibitions upon the political powers of the States are of such a nature that they can be, and even have been, when the occasion arose, enforced by the courts of the United States declaring void all State acts of encroachment on Federal Powers. Thus, and thus sufficiently, has the United States "enforced" these provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or liabilities of persons within the States, as between such persons and the States.

Cong. Globe, 42d Cong., 1st Sess. App. 69 (1871). As several courts have recognized, "the implication of Rep. Shellabarger's statement is that § 1983 was enacted to provide a remedy for the latter category of constitutional violation he mentions, and not the former." *Consolidated Freightways*, 730 F.2d at 1146 n.16. See *White Mountain*, 810 F.2d at 849.[8]

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[7] In fact, in one of its earliest interpretations of Section 1983's predecessor statute, the Court held that the Contracts Clause does not confer a "right[] secured to individuals by the Constitution" within the meaning of the statute. *Carter v. Greenhow*, 114 U.S. 317, 323 (1885).

[8] Both petitioner (Br. 16 n.14) and ATA (Br. 17-18 n.7) suggest that Rep. Shellabarger's remarks should be disregarded, notwith-

II. A PREEMPTION CLAIM IS COGNIZABLE UNDER SECTION 1983 ONLY WHEN THE UNDERLYING STATUTE CREATES FEDERAL "RIGHTS"

1. Because violations of the Supremacy Clause are not themselves cognizable, the issue in a Section 1983 action grounded on preemption must be whether the defendant's violation of the underlying statute deprived the plaintiff of "rights * * * secured by the * * * laws" of the United States. As petitioner recognizes (Br. 30-31), not every statute "create[s] enforceable rights, privileges, or immunities within the meaning of § 1983." *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 423 (1987). See *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981). Indeed, not every statute that contains mandatory rather than precatory language creates rights. In our view, the prerequisites for the existence of a statutory right are more complex: the statute must have been passed for the special benefit of persons like the plaintiff; Congress must have intended the statute's requirements to be enforceable; and the statute must establish reasonably specific and judicially manageable standards of conduct.

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standing his leading role in shepherding Section 1983 through Congress, because they were offered during debate on a proposed Section 2 of the Civil Rights Act of 1871 (the so-called Sherman Amendment) rather than Section 1, the predecessor to Section 1983. In fact, however, the debate was not so neatly divided. See Cong. Globe, 42d Cong., 1st Sess. App. 68-70 (1871). In any event, the Sherman Amendment differed from Section 1983 in the remedy it offered rather than in the rights it protected. It would have supplemented Section 1983 by providing a cause of action against the local government to persons injured in riots in a manner that denied them "any right conferred * * * by the Constitution and laws of the United States." Cong. Globe, 42d Cong., 1st Sess. 749, 755 (1871), reprinted in *Monell*, 436 U.S. at 703-704. There is no reason to doubt that the substantive scope of Sections 1 and 2 were identical; the debate on the Sherman Amendment was directed entirely at the propriety of the broad Section 2 remedy. See *Monell*, 436 U.S. at 669-683.

There is nothing controversial in this list of prerequisites: they both follow directly from this Court's holdings and accord with the common sense understanding of the term "right." Thus *Wright*, the Court's most recent decision in the area, held that a municipal violation of a statute establishing rent ceilings for low income public housing tenants could be challenged under Section 1983 because it set "a mandatory limitation" whose "intent to benefit tenants is undeniable." 479 U.S. at 430. The Court added that the benefits mandated by Congress were "specific and definite" and therefore not "beyond the competence of the judiciary to enforce." *Id.* at 432. The Court was unanimous in recognizing this as the proper mode of analysis; in dissent, Justice O'Connor agreed that "an intent to create substantive rights" may be discerned when a statute "is phrased in mandatory and not merely precatory terms," "places an unmistakable focus on the benefited class," and "is phrased using right-creating language rather than being framed 'simply as a general prohibition or a command to a federal agency.'" *Id.* at 433, quoting *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 772 (1981).[9] See *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 18-19, 27-28 (1981). Cf. *Jackson Transit Authority v. Amalgamated Transit Union*, 457 U.S. 15, 29 n.12 (1982).

This inquiry is a familiar one, for "[w]hether a federal statute confers substantive rights is not an issue unique to § 1983 actions." *Wright*, 479 U.S. at 432 (O'Connor, J., dissenting). The first step in determining whether to imply a private right of action under a federal statute, for example, necessarily involves deciding whether the statute "create[s] a federal right in favor

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[9] The disagreement in *Wright* involved the question whether the plaintiffs came "within the scope of the right that Congress intended to confer" (479 U.S. at 433-434 (O'Connor, J., dissenting)), and the subsidiary question whether an administrative regulation may create rights within the meaning of Section 1983. See *id.* at 437-441 (O'Connor, J., dissenting).

of the plaintiff," which turns on whether the plaintiff is "'one of the class for whose *especial* benefit the statute was enacted'" (*Cort v. Ash*, 422 U.S. 66, 78 (1975) (emphasis in original) (citation omitted)), as well as on "whether the language of the statute indicates that Congress intended that it be enforced through private litigation." *Coutu*, 450 U.S. at 771. See *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984); *California v. Sierra Club*, 451 U.S. 287, 293 (1981).[10] The Court has used a parallel analysis in determining whether review of administrative action is precluded under the Administrative Procedure Act. See *Block v. Community Nutrition Institute*, 467 U.S. 340, 346-348 (1984).

This approach plainly accords with the congressional intent in enacting Section 1983. The legislative debates did not address the sorts of statutes that were thought to create rights (which is hardly surprising, since deprivations of rights secured by law were not made actionable under Section 1983 until 1874 (see page 10, supra)). But the term "right" had an accepted meaning at the time: it was understood to embrace those things that could "'be lawfully claimed'" (Cong. Globe, 42d Cong., 1st Sess. 313 (1871) (remarks of Rep. Burchard) (citation omitted)), encompassing "an enforceable claim or title to any subject matter whatever." W. Anderson, *A Dictionary of Law* 905 (1893). These, as we note above (at 12-13), were the sorts of constitutional rights that Congress had in mind in enacting Section 1983. While there is an element of circularity to this definition —a right was an enforceable claim, while the enforceability of a claim turned on whether it was a right— rights plainly were understood to flow from those laws that were intended to secure benefits to particular individuals. The courts of the time in fact recognized common law rights of action only under those statutes that were enacted for the benefit of special classes of persons. See, *e.g.*, *Hayes v. Michigan Central R. Co.*, 111 U.S. 228, 240 (1884); *Pollard v. Bailey*, 87 U.S. (20 Wall.) 520, 527 (1874); T. Cooley, *Law of Torts* 790 (2d ed. 1888). See generally *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 374-375 (1982).

[10] As Chief Judge Wald has noted, "in a case like ours, where a separate congressionally created cause of action, § 1983, clearly exists, then the focus on whether the statute creates rights is appropriate, and the value of the first *Cort* factor is retained." *Edwards v. District of Columbia*, 821 F.2d 651, 655 n.4 (D.C. Cir. 1987) (opinion of Wald, J.).

2. The courts of appeals generally have applied the test set out above to determine whether violations of federal statutes are actionable under Section 1983. Those courts that have analyzed the question closely have concluded, in Chief Judge Wald's words, that an inquiry into whether a statute creates rights "comprises the first of four [*Cort v. Ash*] factors used to determine whether to imply a cause of action from a federal statute" (*Edwards v. District of Columbia*, 821 F.2d 651, 654 n.4 (D.C. Cir. 1987) (opinion of Wald, J.)). This test turns on whether the law contains "specific language of obligation [that] narrowly cabins the discretion of officials, and, by the same terms, secures rights to a specific class of people" (*id.* at 656). See *Victorian v. Miller*, 813 F.2d 718, 720-721 (5th Cir. 1987) (en banc); *Polchowski v. Gorris*, 714 F.2d 749, 751 (7th Cir. 1983). Other courts, while not offering as detailed an analysis, "have, for the most part, upheld rights claims in statutes that dictate specific action and leave little room for choice, while rejecting rights claims in statutes that merely indicate broad preferences." *Edwards*, 821 F.2d at 656 (opinion of Wald, J.).[11] We note that the Solicitor General has advocated a similar approach.[12]

[11] See, *e.g.*, *Gonzalez v. Pingree*, 821 F.2d 1526, 1527 (11th Cir. 1987); *Smith v. Kirk*, 821 F.2d 980, 982-983 (4th Cir. 1987); *Scrivner v. Andrews*, 816 F.2d 261, 262-264 (6th Cir. 1987); *Genesee Brewing Co. v. Village of Sodus Point*, 733 F.2d 258, 259 (2d Cir. 1984). Cf. *Consolidated Freightways*, 730 F.2d at 1146 (constitutional rights secured by Section 1983 are important personal rights).

[12] In *State of Oregon v. Coos Bay Care Center*, No. 86-1419, the Solicitor General argued that, "[i]n determining whether private

Indeed, although petitioner maintains (Br. 24-25) that the Ninth Circuit is making use of some sort of aberrational test, that court in fact has embraced the analysis set out above. The Ninth Circuit thus has recognized the critical inquiry as being "similar to the 'specially benefitted class' prong of *Cort v. Ash*," explaining that a court must look to whether "Congress mandated an entitlement or merely encouraged a certain activity" and must "determine whether plaintiffs are members of a particular class that Congress intended to benefit." *Clallam County v. Department of Transportation*, 849 F.2d 424, 428 (9th Cir. 1988). See *Coos Bay Care Center v. State of Oregon*, 803 F.2d 1060, 1062-1063 (9th Cir. 1986), vacated to consider the suggestion of mootness, 108 S. Ct. 52 (1987); *Boatowners & Tenants Ass'n v. Port of Seattle*, 716 F.2d 669, 672-674 (9th Cir. 1983). While we have taken issue with the Ninth Circuit's conclusions about whether particular statutes satisfy this test,[13] the test itself as enunciated is unobjectionable.

Even *White Mountain Apache Tribe v. Williams*, *supra*, the decision upon which the court below wholly relied, concluded that "the critical inquiry * * * is whether there

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parties may sue to enforce a statute, this Court has stated, '[t]he question is not simply who would benefit from the Act, but whether Congress intended to confer rights upon those beneficiaries' (*California v. Sierra Club*, 451 U.S. 287, 294 (1981)). In answering this question [in a Section 1983 case], a court must look, as this Court did in *Pennhurst* and *Wright*, to the language and history of the statute to discern whether Congress clearly intended to create a 'specific and definite' right and to authorize private enforcement of that right." Br. 14.

[13] In *Coos Bay*, for example, we disagreed with the court of appeals' conclusion that 42 U.S.C. § 1396a(a)(13)(A), a provision of the Social Security Act, was enforceable by private parties under Section 1983. This Court granted review in the case but did not reach the merits, vacating and remanding for a determination of mootness. 108 S.Ct. 52 (1987).

is any basis for the judiciary to infer a congressional intent to create rights enforceable under § 1983." 810 F.2d at 852. While the *White Mountain* court, like the court below, put some of its discussion in terms of whether state action "actual[ly] conflict[ed]" with or "violated" a federal statute (see *id.* at 850 n.8, 851 n.9), the heart of its analysis was its conclusion that a Section 1983 action was not available because the State had interfered "with federal policy objectives and the free exercise of authority by federal officials—not individual or tribal rights." *Id.* at 851.

3. Resolving a Section 1983 claim that is grounded on preemption accordingly requires a determination whether Congress intended the preemptive federal statute to confer individual rights on the plaintiff. While this inquiry will turn on the meaning of the statute involved, the nature of the preemption may shed considerable light on Congress's intentions.

We therefore take issue with ATA's assertion that "Congress's decision to limit or eliminate state regulation almost always will be motivated by a desire to secure rights conferred upon persons subject to the preempting federal statute" (Br. 21). When Congress preempts a regulatory field, for example, it is unlikely to have intended to create individual rights. To the contrary, such preemption typically involves "subject[s] demanding exclusive federal regulation in order to achieve uniformity vital to national interests" (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963)), or fields "in which 'the federal interest is so dominant that the federal system will be presumed to preclude enforcement of state laws on the same subject.'" *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). See generally *Schneidewind*, 108 S.Ct. at 1150. This sort of broad preemption

safeguards federal regulatory prerogatives rather than the rights of individuals. Indeed, a federal statute that preempts the field will displace even state laws that share the goals and substantive reach of the federal legislation (see, *e.g.*, *Wisconsin Department of Industry v. Gould Inc.*, 475 U.S. 282, 287-288, 291 (1986); *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)); when a regulated party seeks to displace state regulatory efforts in such circumstances, it hardly can be said that the plaintiff has been denied a substantive right to engage in conduct protected by federal law.[14]

The same thing is true of other, more limited forms of what might be termed structural preemption. An example (as petitioner recognizes (Br. 33-34 n.34)) is so-called *Garmon* labor preemption, first articulated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), which precludes the States from regulating matters that are within "the primary jurisdiction of the National Labor Relations Board." *Brown v. Hotel & Restaurant Employees*, 468 U.S. 491, 502 (1984). See *Golden State I*, 475 U.S. at 613-614; *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519, 528 (1979) (plurality opinion). Since *Garmon* preemption comes into play "even when the state law regulates conduct only arguably protected by federal law" (*Brown*, 468 U.S. at 502), by definition it may involve conduct that is not in fact protected by the NLRA.

This conclusion is confirmed by the State's ability to overcome *Garmon* preemption when it has powerful interests of its own at stake (see, *e.g.*, *Brown*, 468 U.S. at 502-503; *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 748-749 n.26 (1985)); if the State may prevail in its regulatory efforts in any given case, the regulated party can hardly have a substantive right to engage in the regulated conduct. And again, because *Garmon* preemption is appropriate even when the state regulatory activity has "[t]he manifest purpose and inevitable effect" of "*enforc[ing]* the requirements of the NLRA" (*Gould*, 475 U.S. at 291 (emphasis added)), a private party cannot be said to have a substantive right to engage in the conduct regulated by the State simply because the regulation is invalidated as an infringement of the NLRB's prerogatives.

Indeed, as a general matter a statute that fails to preempt state law expressly is unlikely to have been intended to create an individual right to freedom from state regulation. It is a truism that the surest guide to congressional intent is the language of the statute, and that is no less true when the question is whether Congress intended to create rights: when deciding whether a law "confers a right that could be judicially enforced," the Court "look[s] first, of course, to the language of the statute." *Daily Income Fund*, 464 U.S. at 534. See *Sea Clammers*, 453 U.S. at 13. And if Congress simply engages in regulation of its own without taking the trouble to exclude state regulation expressly, preemption will likely be in order (if at all) only to maintain the integrity of the federal regulatory structure. Such a statute cannot, after all, be "phrased using rights-creating language." *Wright*, 479 U.S. at 433 (O'Connor, J., dissenting).

Having said this, we should add that the focus of the inquiry must remain the statute that is said to create federal rights—and that the violation, even of a statute that imposes express, mandatory, and specific limits on state action, will not support a suit under Section 1983

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[14] ATA also suggests that "[t]he fact that private parties have standing to assert preemption claims is strong evidence that preemption rules secure individual rights" (Br. 21 n.9). In fact, however, the Court has made it clear that plaintiffs may be able to satisfy standing requirements even in circumstances where Congress has not created enforceable rights. See *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 400-401 n.16 (1987) (standing requirements are more liberal than the first prong of the *Cort* test).

unless the statute also was intended to secure individual rights. *California v. Sierra Club*, *supra*, provides a clear illustration of this principle. That case involved a suit against California, as well as various state and federal officials and county agencies, for asserted violations of Section 10 of the Rivers and Harbors Appropriation Act of 1899 (RHAA), 33 U.S.C. § 403, which prohibits the obstruction of navigable waterways. See 451 U.S. at 289-291. Applying *Cort v. Ash*, *supra*, the Court held that the plaintiffs could not assert an implied right of action to enforce the RHAA, explaining that the statute was "the kind of general ban which carries with it no implication of an intent to confer rights on a particular class of persons." 451 U.S. at 294. The Court added that the RHAA was "designed to benefit the public at large by empowering the Federal Government to exercise its authority over interstate commerce," finding that "Congress was not concerned with the rights of individuals." *Id.* at 295. Had *Sierra Club* been brought as a Section 1983 suit against state and county officials, we cannot believe that the result would have been different; the conclusion that the RHAA was not designed to confer individual rights would surely have been fatal to such a claim.

4. There are strong arguments that the NLRA was not designed to create "rights" that are enforceable against local governments under Section 1983. The NLRA does not, of course, expressly create rights of that sort (or, indeed, expressly impose obligations of any kind on local governments). To the contrary, as the court below noted (Pet. App. 24a-25a), the NLRA in terms imposes obligations only on employers and labor unions, which they may seek to enforce against *each other*. See 29 U.S.C. § 152. While the Court has implied restrictions on state and local governments from the structure of the NLRA, there is absolutely no evidence that Congress had it in mind to confer benefits of the sort that could be claimed affirmatively in an action for damages.

More broadly, there is no indication that the NLRA was designed to create enforceable entitlements for the benefit of individual employers or labor unions; to the contrary, in enacting the statute, Congress indicated that it was setting a national labor policy in the interest of securing industrial peace. See 29 U.S.C. § 151. Thus so-called *Machinists* preemption (named for *Machinists v. Wisconsin Employment Relations Committee*, 427 U.S. 132 (1976)), which bars state interference with conduct that is neither prohibited nor protected by the NLRA and which the Court in *Golden State I* found applicable here (475 U.S. at 614-616), is seemingly concerned with safeguarding the regulatory structure established by Congress and not with the creation of rights that may be asserted in an action for money damages. Cf. Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1352 (1972) (predecessor to *Machinists* indicates that "Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests"); Cox, *Recent Developments in Federal Labor Law Preemption*, 41 Ohio St. L.J. 277, 278, 292-293 (1980).[15]

But however that may be, we believe that there is no need for the Court to reach out to apply the proper test to the peculiar circumstances here. The appropriate approach to the identification of Section 1983 rights is readily discernible from *Wright* and *Pennhurst*, and the

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[15] Petitioner (Br. 21) attempts to draw support from the Court's statement that employers have a "right" to use those economic weapons that were not prohibited by Congress. See *Golden State I*, 475 U.S. at 618. But the Court's use of the word in an entirely different context hardly amounts to a determination that Congress meant the NLRA to create "rights" within the meaning of Section 1983. Indeed, in *Pennhurst*, the Court held that a statute that "speaks in terms of 'rights'" may not create enforceable obligations if that is not Congress's intention. 451 U.S. at 18.

courts of appeals—including the Ninth Circuit—have not demonstrated any confusion in the area.

Indeed, while the decision below has its cryptic aspects, it may be read as resting on the simple conclusion that the NLRA does not create enforceable rights against entities that are not parties to collective bargaining agreements. Thus the court of appeals recognized the proper inquiry to be whether the statute creates " 'rights, privileges, or immunities within the meaning of section 1983' " (Pet. App. 23a (citation omitted)), and held, "[a]gainst the backdrop of *Wright*, and decisions of this court, * * * that no such right, privilege or immunity secured by the NLRA was 'violated' by [respondent] in this instance" (*id.* at 24a). While petitioner takes issue with this conclusion (Br. 20-21), there is no conflict in the circuits on whether the NLRA creates such rights, and the issue is not a recurring one; so far as we are aware, this is the only case in which it has arisen. Because the dispositive question here is not squarely subsumed within the question presented as reformulated by the Court, it accordingly would be appropriate for the Court to dismiss the writ of certiorari as improvidently granted.

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted,

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